87-1758

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MEYERS INDUSTRIES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

KENNETH P. PRILL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether there can be a finding of "concerted activity" under the National Labor Relations Act, outside the presence of a collective bargaining relationship as a matter of law, without an employee taking action with at least one other employee or with specific authorization of another employee.

2. Whether a single employee does not engage in concerted activity solely as a permissible construction of the National Labor Relations Act, rather than as a matter of law, when the employee is acting without the knowledge, authorization or approval of any other employee in a non-union situation and the action is not asserted for the mutual aid or protection of any other employee.*

*Meyers Industries, Inc. is a wholly-owned unaffiliated Michigan corporation.

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Meyers Industries, Inc., the charged party in Case No. 7-CA-17207 before the National Labor Relations Board ("Board"), respectfully prays that a petition for writ of certiorari from the decision of the United States Court of Appeals for the District of Columbia Circuit be issued in the above styled case.

OPINIONS BELOW

The history of this case is as follows: Meyers Industries, Inc., 268 N.L.R.B. No. 493 (1984) ("Meyers I), remanded, Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985) ("Prill I"), on remand Meyers Industries, Inc., 281 N.L.R.B. No. 118 (1986) ("Meyers II"); aff'd, Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987) ("Prill II"). The initial opinion of the Board is reproduced in the Supplemental Appendix ("S. App.") at pages 1-66. The initial opinion of the court of appeals is reproduced in the Supplemental Appendix at pages 67-179. The Supplemental Decision of the Board is reproduced in the Appendix ("App.") at page 1a. The final opinion of the court of appeals is reproduced in the Appendix at page 45a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1987. This

Court has jurisdiction to review the judgment of the District of Columbia Circuit under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C § 157 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

STATEMENT OF THE CASE

1. Factual Background

Meyers Industries, Inc., is a non-union aluminum boat manufacturer and was an employer, charged by Kenneth Prill, its employee, with a violation of Section 8(a)(1) of the National Labor Relations

Act ("Act") for discharging him by allegedly interfering with his rights guaranteed under Section 7 of the Act.

Prill had experience as an owner-operator truck driver for about four years before he went to work for Meyers. S. App. at 26. He was immediately assigned to drive what was known as the "red Ford truck" and its accompanying trailer, which he used to haul boats from Meyers' facility in Tecumseh, Michigan to dealers throughout the country. Within a short time, Prill's equipment began to give him difficulty, particularly with the brakes and steering. S. App. at 73. Prill complained to his supervisor, Dave Faling, the company president, Alan Beatty, and the mechanic, Buck Maynard. S. App. at 74.

Maynard, on at least one occasion had attempted to correct these problems, but was unable because of the age of the

vehicle. S. App. at 28, 74.

On one trip to Xenia, Ohio, Prill stopped at an Ohio State roadside inspection station where the truck was cited for several defects, some relating to the brakes. S. App. at 28, 74. These citations were forwarded to his supervisors at Meyers. Id.

During June, 1979, another driver, Ben Gove, drove the red truck and claimed to experience steering problems which nearly caused an accident. S. App. at 27, 75. Gove reported these difficulties to Meyers' supervisors and Prill was present when Gove told Faling that he would not drive the truck again until it was repaired. Id.

In July, 1979, while Prill was driving through Athens, Tennessee, he had an accident that was caused by the malfunctioning brakes. Prill called the Company's president, Alan Beatty, who

instructed him to have a mechanic look at the equipment, but to get it home as best he could. Id. Prill did not return home with the trailer that night and instead called Beatty and Wayne Seagraves, another company supervisor, the next day. Both were upset that Prill had not brought the truck back as directed. S. App at 29, 78.

After this conversation, Prill contacted the Tennessee Public Service Commission to arrange for an official inspection of the vehicle. S. App. at 29, 78. As a result of that inspection a citation was issued putting the unit out of service because of bad brakes and damage to the hitch area. Id.

At the same time, Meyers Industries sent Maynard, the mechanic, to Tennessee. Upon seeing the citation, he called Beatty, S.App. at 30, and together they decided to sell the trailer for scrap. Id.

Two days later, Prill reported to work and was summoned to Seagraves' office, where he was questioned about the accident and the damage to the truck. Specifically, he was questioned as to why he did not chain the trailer to the truck as he was directed, to which he responded that he did not consider the vehicle safe to drive. Id. At the end of this conversation, Prill was terminated because, in the words of Seagraves, "we can't have you calling the cops like this all the time."

Kenneth Prill then filed an unfair labor practice charge with the National Labor Relations Board claiming that Meyers Industries, Inc. violated §8(a)(1) of the Act by discharging him because of his safety complaints and his refusal to drive an unsafe truck.

Although the agency's Administrative Law Judge found a violation of section 8(a)(1) of the Act, on review, the Board

reversed the findings of the Administrative Law Judge, and found that although Kenneth Prill had been discharged for refusal to drive an unsafe truck, that refusal was not "concerted activity" within the meaning of Section 7 of the Act. As the basis for its decision the Board reversed a line of its previous decisions beginning with Alleluia Cushion Company, Inc., 221 N.L.R.B. 999 (1975), a decision holding that in non-collective bargaining cases when an employee "seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, [the Board] will find implied consent thereto and deem such activity to be concerted." 221 N.L.R.B. at 1000.

On review of the agency's decision, the Court of Appeals for the District of

Columbia Circuit disagreed with the Board's position that its definition of "concerted activities" was compelled by its interpretation of Section 7, and found that the Board failed to properly exercise its statutory discretion. Based upon this finding the appellate court, over Judge Bork's dissent, remanded the case to the Board for reconsideration in light of this Court's then recent decision in NLRB v. City Disposal Systems, 465 U.S. 822, 104 S.Ct. 1505 (1984), a case in which the Court, citing the Board's wide discretion, upheld an NLRB decision giving a broad interpretation to the term "concerted activities" in a situation where a single employee acted, unlike this case, within the umbrella of a collective bargaining agreement. The practical effect of the District of Columbia Circuit's decision was to place Meyers Industries, Inc. in a position of extreme vulnerability once

again.

Meyers Industries, Inc. sought leave to intervene in the case at that time (No. 85-464), and filed a petition for writ of certiorari, Case No. 85-463. The motion and petition were denied, presumably on the grounds that the court of appeals opinion was an interim order not yet ripe for review, as Mr. Prill argued in opposition to the petition. 106 S.Ct. 313, 352 (1985).

On remand, the Board determined "to adhere to the Meyers I definition of concerted activity as a reasonable construction of section 7 of the Act". App. at 6a. Consequently, the Board explained that its determination was also a reasonable interpretation of the concerted action provision of the statute for purposes of the special remand. The Board also stated that "[h]aving accepted the remand, the Board must observe the court's

opinion as the law of the case and, necessarily, its judgment that the Meyers I definition is not mandated by the Act." App. at 5a. The Board therefore affirmed its previous decision in Meyers I.

The court of appeals in its second review, Prill II, stated of Meyers II, that "[t]he Board further contends that its new position, though not required, 'proceeds logically' from its analysis of the legislative history" App. at 53a. This time, the court of appeals was "satisfied that the Board has not repeated its past error by suggesting that its new definition of concerted action is merely a return to 'the standard on which the Board and courts relied before Alleluia,'" App. at 56a. Accordingly, "[b]y requiring that workers actually band together, the NLRB has adopted a reasonable--but by no means the only reasonable--interpretation of Section 7." App. at 57a.

On February 25, 1988, Meyers Industries, Inc. was granted leave to intervene in the case by the court of appeals for the purpose of seeking further review. The court of appeals' view of the statutory requirement that "concerted activity" may have more than one meaning under the NLRA or can be applied to individual activity unrelated to a group purpose has no support in the statute and must be reversed.

2. Meyers Industries Inc.'s Interest

Although the company had succeeded before the Board, the Board has failed to sustain the common position both had taken on review. Meyers Industries' argument has consistently been that the Board's 1975 decision in Alleluia Cushion was an improper application of the phrase "concerted activities" in Section 7 of the Act, and therefore should be reversed. Although the Board has taken this same

position in its supplemental decision and in its position on remand, it has done so based upon its view that its definition is mandated by the Act, except for the purposes of the remand in this case.

The court of appeals did not overrule the substance of the Board's decision, rather it concluded that the Board's actions were not mandated by the Act, but could be a discretionary administrative construction in light of NLRB v. City Disposal Systems.

It is the position of Meyers Industries, Inc. that the Board's decision in Meyers I is a correct reading of the statute that provides a discernible two-part test to "concerted activity" which must be applied in all cases involving section 7 activity, regardless of the Board's ability to reach the same conclusion based upon its administrative expertise in applying the National Labor Relations Act at any given point in time.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DECIDED THE IMPORTANT QUESTION RELATING TO THE STATUTORY LANGUAGE OF "CONCERTED ACTIVITY" UNDER THE NLRA IN A WAY IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS OF APPEAL

The majority opinion of the Court of Appeals is in direct conflict with this Court's decision in NLRB v. City Disposal Systems, and misapplies the limitations on agency interpretation of law as set forth in SEC v. Chenery Corp., 318 U.S. 80 (1943). Additionally, the practical result of the District of Columbia Circuit's decision is to undermine the Board's application of the Act by attempting to force the Board to adopt the court's interpretation of critical statutory language, that is, the phrase "concerted activities" in section 7 of the Act as it applies to employees not covered by a collective bargaining agreement.

In the Board's initial decision in this case, Meyers Industries, Inc., 268

N.L.R.B. 493, 496 (1984) (S. App. at 21), it determined that,

> the per se standard of concerted activity, by which the Board determines what ought to be of group concern and then artificially presumes that it is of group concern, is at odds with the Act. The Board and the courts always considered, first, whether the activity is concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both "concerted" and "protected." A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity "concerted" within the meaning of Section 7. (emphasis in original).

The District of Columbia Circuit concluded on review, however, that "the Board erred in the assumption that the NLRA mandates its present interpretation of "concerted activities" except as set out in its test and second, that the Meyers test is a "new and more restrictive standard" rather than a return to Board law predating Alleluia Cushion on the subject. Prill v. NLRB, 755 F.2d 991, 998

(D.C. Cir. 1985) ("Prill I") (S. App. at 67).

This view of the Board's action was grounded by the court of appeals on its decision in Planned Parenthood Fed. of America, Inc., v. Heckler, 712 F.2d 650 (D.C. Cir. 1983), in which the court of appeals ruled that "[i]f a regulation is based on an incorrect view of applicable law, the regulation cannot stand as promulgated, unless the 'mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached.'" (quoting Massachusetts Trustees v. United States, 377 U.S. 235, 248 (1964)).

Based on this view, the court of appeals misapplied the ruling of this Court in SEC v. Chenery Corp., 318 U.S. 80 (1943), that the validity of a regulation is to rest solely on grounds the agency professes. The court of appeals found

that the Board was not returning to the standards in place prior to Alleluia Cushion Co., 221 N.L.R.B. 999 (1975), as it stated, and that the Court's decision in NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984), proves that section 7 does not require a narrow interpretation of "concerted activities" covered by its scope. Prill I, 755 F.2d at 952. Thus, the court of appeals stated "[i]n Meyers, however, the Board failed even to consider whether the discharge of an employee because of his safety complaints would discourage other employees from engaging in collective activity to improve working conditions." Id. at 953.

Rather than determining whether the Board's interpretation of the Act was reasonable, the court of appeals remanded the case to the Board holding that the Board did not apply the rule of City Disposal, and worse, did not properly

exercise its discretion under the Act. Consequently, the court of appeals viewed City Disposal as not requiring a "literal interpretation" of section 7, but instead the Board could have otherwise reached the same conclusion by relying upon its own administrative expertise in deciding that a particular approach to concerted activity should be taken. Prill I, 755 F.2d at 956 (S. App. 130).

As set out earlier, the Board on remand, "reconsidered this case in light of the court's opinion...and has decided to adhere to the Meyers I definition of concerted activity as a reasonable construction of Section 7 of the Act." App. at 6a. The Board also believed its original decision was consistent with City Disposal, where the Court had found concerted activity in "an individual employee's invocation of a right contained in a collective bargaining agreement..." App. at 15a.

I. THE OPINION OF THE COURT OF APPEALS IS IN CONFLICT WITH NLRB V. CITY DISPOSAL SYSTEMS

The centerpiece of the Board's decision was an extensive re-evaluation of the application of the phrase "concerted activity" in section 7 of the Act. It included a review of the peripheral legislation, such as section 2 of the Norris-LaGuardia Act, 29 U.S.C. §102, and the law antecedent to the modern section 7 of the NLRA. From this analysis the Board concluded that section 7 cannot be interpreted in a manner that would permit a finding that a single employee, acting in his or her own interest, could be engaged in "concerted activities" when there is no collective bargaining agreement involved.

The Board then established a standard reflecting this interpretation which required the General Counsel, in future cases, to prove the existence of concerted activity rather than be permitted to rely

on a presumption of implied concerted activity in cases where a single employee seeks to enforce the provisions of another statute for the benefit of all employees.

In City Disposal, this Court found that the safety complaint raised by the employee was based on a specific provision of the union agreement and that the assertion of his contractual rights under the agreement affected all employees covered by the contract. 465 U.S. at 830. Based on the Board's Interboro Contractors, Inc. case, 157 N.L.R.B. 1295 (1966), enf'd, 388 F.2d 495 (2d Cir. 1967), the Court agreed with the Board that a right contained in a collective bargaining agreement was "concerted activity in a very real sense." Id. at 832.

The Court in City Disposal also had occasion to view the Board's position in Meyers I as irrelevant to the application of the Interboro doctrine it was applying

in that case, because there was no collective bargaining agreement in Meyers I which could have permitted an overt linkage to concerted activity. 465 U.S. at 829 n. 6. Moreover, even the Court majority was able to quote directly from Meyers I as authority in finding that although the phrase "concerted activity" is not defined in the NLRA, the Court determined in City Disposal that it "must elucidate...the precise manner in which particular actions of an individual must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity." 465 U.S. at 830-31 (emphasis added).[1]

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[1]The four members of the Court who dissented in the case took exception with the majority's view that a collective bargaining agreement, even under the Interboro doctrine, was enough to find "concerted activity," although the activity could be "protected...But it stretches the language past its snapping (continued...)

In City Disposal, 465 U.S. at 829, this Court also confirmed that "the task of defining the scope of Section 7 is for the Board to perform in the first instance as it considers the wide variety of cases that come before it, and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference." Perhaps the use of the word "mandated" was a poor choice, but it is clear from the Board's majority opinion that from its interpretation of Section 7 it was compelled to find that Congress had intended that "concerted activity," as applied to non-collective situations, "must be linked" to activity of two or more persons.[2]

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[1](...continued)
point to cover an employee's action that is taken solely for personal benefit." 465 U.S. at 847.

[2]The Second Circuit in Ewing v. NLRB, 732 F.2d 1117 (2d Cir. 1985), remanded a (continued...)

II. THE SCOPE OF THE BOARD'S AUTHORITY TO INTERPRET THE ACT IN A CONSISTENT MANNER IS A QUESTION OF IMMEDIATE IMPORTANCE

The decisions of the NLRB have substantial and immediate impact on the major segment of commerce in this nation. The question involved in this case is crucial to the ordinary expectations of both employees and employers. If the decision here is left undisturbed, it will have a measurable effect on the caselaw developed in non-union contexts in other circuits and in allocating the burden of proof.

The Fourth Circuit in Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 310 (4th Cir. 1980), a case involving a discharge for filing workmen's compensation claims, reached the same conclusion as the

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[2](...continued)
similar case to the Board in light of Meyers I because the phrase "concerted activities" cannot be read in its view literally under any circumstances. The Board reaffirmed its decision in that case recently. Darling, Inc., 287 N.L.R.B. No. 148 (Feb. 29, 1988).

Board in Meyers I by explaining that "'concerted activity' is an essential predicate, in effect a jurisdictional requirement for Board action under the Act in a case such as this." In Krispy Kreme, the Board had attempted to infer from Alleluia Cushion a presumption that a single employee's action was directed at group activity. The Fourth Circuit rejected this notion and agreed with the rule applied in other circuits that to be protected under section 7, employee activity must be concerted in nature and pursued for "other mutual aid or activity." See Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980); NLRB v. Bighorn Beverage Co., 614 F.2d 1238 (9th Cir. 1980); NLRB v. Wilson Freight Co., 604 F.2d 712 (1st Cir. 1979); NLRB v. Buddie Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1979); NLRB v. Dawson Cabinet Co., 566 F.2d 1079 (8th Cir. 1977);

Mushroom Transportation Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964).

Without proof that the single employee's action was intended for mutual aid, contemplated group activity or the employee was acting on behalf of other employees, the action is at most "for the benefit of other employees in a theoretical sense...It will not satisfy the condition for Board action under Section 7 that an employee's complaint may be directed at working conditions which affect all employees" unless the action contemplates such group activity. Krispy Kreme, 635 F.2d at 307.

The District of Columbia Circuit's most recent decision in Prill II, however, treated the Board's Supplemental Decision in Meyers II as a retreat from its Meyers I decision. The Board, however, did not abandon its Meyers I approach, but presents a rule of the case analysis for

the benefit of the court of appeals that its legal position on Section 7 elucidated in Meyers I is also "responsive" to the purposes of section 7 and "proceeds logically" from the legislative history. App. at 5a. Thus, on the second petition for review by Mr. Prill, the court of appeals concluded that "[b]y requiring that workers actually band together, the NLRB has adopted a reasonable--but by no means the only reasonable--interpretation of section 7." App. at 57a.

Because of the high potential for this continuous but inconclusive activity between the courts and the Board on this issue, Meyers Industries, Inc. maintains that the question regarding "concerted activities" in a non-collective bargaining situation, reserved in City Disposal, is ripe for review in this case, not only because of the misconstruction of City Disposal, but because the recent pattern

of circuit court decisions is inhibiting the Board from administering the Act, which in turn, creates an atmosphere of uncertainty for the vast majority of employers who operate in a non-union context.

If the court of appeals' misreading of the statute and the Board's decision are allowed to become final, the court's opinion will, moreover, encourage the creation of another "new" and "reasonable" interpretation of "concerted activity." This uncertainty will foster new litigation, rather than encourage the prompt settlement of disputes, by refusing to frankly admit that the statute mandates a certain level of group activity or contemplation thereof, for individual action to be protected by section 7. As the issue now stands, there has been no reconciliation of what section 7 requires for its invocation in the non-union context.

CONCLUSION

The Board never receded from its position in Meyers I. The decision of the court of appeals in misreading Meyers II threatens to invoke considerable litigation of the Board's position that an individual seeking the protection of section 7 demonstrate a nexus to group action. For this reason, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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March 30, 1988

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MEYERS INDUSTRIES, INC.

and

KENNETH P. PRILL, an Individual

SUPPLEMENTAL DECISION AND ORDER[1]

On 6 January 1984 the National Labor Relations Board issued its Decision and Order in this proceeding (Meyers I)[2] in which it overruled Alleluia Cushion Co.[3] and its progeny; defined the concept of concerted activity for purposes of Section 7 of the National Labor Relations Act; and reversed the judge's finding that the Respondent had violated Section 8(a)(1) of the Act by discharging employee Kenneth P. Prill. In finding a violation of Section

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[1]Member Johansen did not participate in this decision.

[2]268 NLRB 493 (1984).

[3]221 NLRB 999 (1975).

8(a)(1), the judge had relied on Alleluia to conclude that Prill's individual activity in refusing to drive an unsafe vehicle and in reporting the vehicle to state authorities constituted concerted activity for purposes of Section 7. The Board, however, held that the definition of concerted activity which was expressed in Alleluia does not comport with Section 7. Having rejected the Alleluia standard, the Board formulated a definition of concerted activity to comport with Section 7. Then, applying that standard to the facts surrounding Prill's discharge, the Board upheld the discharge and dismissed the complaint.

Thereafter, Prill, the Charging Party, filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the District

of Columbia Circuit.[4] On 26 February 1985 the court remanded Meyers I on the grounds that the Board, first, erroneously assumed that the Act mandated its Meyers I interpretation of "concerted activities" and, second, relied on a misinterpretation of prior Board and court precedent, indicating to the court a lack of rationale for the new definition.[5] As to the first ground, the court did not express an opinion as to the correct test of concerted activity or whether the Meyers I test is a reasonable interpretation of the Act.[6] The court instead determined that the U.S. Supreme Court's recent decision in NLRB v. City Disposal Systems, 465 U.S. 822 (1984), made clear that the Board was not required to give a "narrowly literal

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[4] Prill v. NLRB, 755 F.2d 941 (D.C.Cir. 1985) (2-1 decision), cert. denied 106 S.Ct. 313, 352 (1985).

[5] Id. at 942, 948.

[6] Id. at 948 fn. 46.

interpretation" to the term "concerted activities," but had substantial authority to define the scope of Section 7. The court concluded that a remand was appropriate "to afford the Board a full opportunity to consider such issues in light of the analysis of section 7 in City Disposal"[7] and to particularize more fully its rationale for the adoption of the Meyers I definition.

On 29 July 1985 the Board notified the parties that it had accepted the remand from the court of appeals and invited the parties to submit statements of position with regard to the remand issues. Thereafter, all parties filed statements of position.[8] The International

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[7]Id. at 957.

[8]On 27 September 1985 the Respondent filed a motion to stay further consideration of the case pending the U.S. Supreme Court's disposition of a petition for writ of certiorari filed by the Respondent. On 4 November 1985 the Court (continued...)

Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO filed an amicus brief.[9]

Having accepted the remand, the Board must observe the court's opinion as the law of the case and, necessarily, its judgment that the Meyers I definition is not mandated by the Act.[10]

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[8](...continued)
denied certiorari. 106 S.Ct. 313, 352 (1985). In light of the Court's action, we deny the Respondent's motion.

The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[9]On 1 October 1985 the Auto Workers filed a motion for leave to file an amicus brief. We have granted the motion and have accepted the amicus brief.

[10]The court also did not consider whether the Board's application of the Meyers I test to Prill's situation was supported by substantial evidence. 755 F.2d at 957 fn. 92. Because our understanding of the court's opinion is that the Board is faced with legal issues on remand, we find it unnecessary to give a detailed statement of the facts or to reiterate the Board's earlier discussion of the application of the Meyers I defini-
(continued...)

The Board has reconsidered this case in light of the court's opinion, the parties' statements of position, and the Auto Workers' amicus brief and has decided to adhere to the Meyers I definition of concerted activity as a reasonable construction of Section 7 of the Act. Consistent with City Disposal, supra, we have exercised our discretion and have chosen the Meyers I definition over other possibly permissible standards for the

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[10](...continued)
tion to those facts. Basically, there is no evidence in this case that employee Prill joined forces with any other employees or by his activities intended to enlist the support of other employees in a common endeavor. As a result, the Board found that Prill did not engage in concerted activities.

We also note that, in her closing argument, counsel for the General Counsel did not contend that Prill's actions constituted concerted activity under "traditional concepts"; rather, she relied on the Board's "expanded" concept of "concertedness" in Alleluia and its progeny.

reasons set forth below.[11]

A. Meyers I is Faithful to the Central Purposes of the Act

At the outset, we reaffirm our recognition that the Board has a wide latitude in interpreting Section 7 of the Act, as the Supreme Court has stated on numerous occasions.[12] That latitude is not without limit, however; and even within the conceivable limits of a general phrase such as "concerted activities," it is surely appropriate to choose that construction that is most responsive to the central purposes for which the Act was created. We believe that our choice in Meyers I, as elucidated in this opinion on

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[11]The court's remand calls for an illumination of our reasons for adopting the Meyers I definition apart from the concerns raised by the rejection of the Alleluia standard. For this reason, we have refrained from repeating here why the Alleluia standard was rejected in Meyers I.

[12]It reiterated this principle in City Disposal, the decision of greatest relevance here. 465 U.S. at 829-830.

remand from the court, does fully reflect those purposes. The precise phrase in Section 7 that we are construing, as the Supreme Court has recently noted in City Disposal, can be traced back to the Norris-LaGuardia Act of 1932.[13] In that statute Congress sought to protect the trade union movement from the hostility of the courts in their use of "the doctrine that concerted activities were conspiracies, and for that reason illegal." Auto Workers Local 232 v. Wisconsin Employment Relations Board (Briggs & Stratton), 336 U.S. 245, 257 (1949). Several years later, in the Wagner Act, in an effort to reduce the industrial unrest produced by the lack of appropriate

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[13]465 U.S. at 834-835. As the Court also noted (id.), Congress had similarly sought to protect peaceful union activities from indiscriminate use of the antitrust laws through exemptions added to the Clayton Act in 1914. See generally H. Wellington, Labor and the Legal Process 38-43 (1968).

channels for the collective efforts of employees to improve workplace conditions, Congress gave employees affirmative protections from employer reprisal for collective activity. The emphasis on collective, as distinct from purely individual, activity is made clear in the Act's "Findings and declaration of policy" (29 U.S.C. s 151): they note the

> ... inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association

and they propose to overcome this inequality by encouraging

> ... the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[14]

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[14]These findings echoed views of Francis Biddle (who was chairman of the

(continued...)

14(...continued)
first National Labor Relations Board, established under Public Resolution 44) in a speech that Senator Wagner placed in the Congressional Record not long after he introduced the bill that became the basis for the Wagner Act. In that speech, which Senator Wagner evidently saw as setting forth the theoretical underpinnings of his legislation, Francis Biddle explained:

> For freedom to work and live decently no longer means the theoretical freedom of a man to make a contract with a steel corporation. There is no freedom of contract where power is all on one side and the choice is to take what you get or starve. Mr. John Lewis, with half a million miners behind him, can make a contract, because he, too, can say, "Take it or leave it." The forces are balanced; the game is even.
>
> There are two theories about the relationship of capital and labor. One is the partnership theory, the other is the class-war theory....
>
> There is, however, one real flaw in the argument that the relationship is one of partnership, which is usually overlooked. A partnership is the result of agreement and presupposes equality of bargaining. This condition does not, as we

(continued...)

To be sure, as Professors Gorman and Finkin have pointed out, the intent of the Wagner Act to extend protections to group action for the improvement of wages and working conditions is not necessarily incompatible with an intent to protect purely individual action for the same purpose;[15] but the fact remains, as the

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[14](...continued)
have already said, apply to an individual seeking a job. The partnership is created as the result of an agreement. Thus it becomes fair to describe the relationship as a partnership only after an agreement has been entered into by the parties from some equality of bargaining power. Such agreements are collective bargaining agreements, signed by employer and union, and are real partnerships, which carry with them the joint good will and spirit of team play of real partnerships.

"Theory of Collective Bargaining--Address by Francis Biddle," reprinted in 79 Cong. Rec. 3183 (1935), and in I Leg.His. 1314, 1317-18 (NLRA 1949).

[15]Gorman & Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U.Pa.L.Rev. 286, 338 (1981).

To give full meaning to the notion of liberty, of course, both avenues of recourse--individual action and group

(continued...)

Supreme Court has repeatedly recognized, that it is protection for joint employee action that lies at the heart of the Act.[16] (Congress' addition, in the

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[15](...continued)
activity--are necessary and desirable. As de Tocqueville observed, a century and a half ago:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty.

A. de Tocqueville, Democracy in America 98 (R. Heffner ed. 1956). In the Wagner Act, Congress sought to vindicate the exercise of associational rights for attaining improved wages and working conditions. See Fried, Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and its Prospects, 51 U.Chi.L.Rev. 1012, 1028-29 (1984).

[16]See, for example, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (citing American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 (1921)), in explaining the background of the Wagner Act ("[A] single employee was helpless in dealing with an (continued...)

Taft-Hartley Act, of a right to "refrain" from participating in concerted activities, did not shift the focus of the Act from collective action to individual action, but merely made it possible for individual employees to choose not to participate in the former.) It is there-

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[16](...continued)
employer....[U]nion was essential to give laborers opportunity to deal on an equality with their employer"); Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (contrasting Title VII of the Civil Rights Act, concerned with "an individual's right to equal employment opportunities" with the "majoritarian processes" of the NLRA); NLRB v. City Disposal Systems, 465 U.S. 822, 835 (1984) (Sec. 7 embodies congressional intent "to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements"); Metropolitan Life Ins. Co. v. Massachusetts, 106 S.Ct. 2380, 2396-98 (1985) (distinguishing minimum-labor-standard laws, which apply to all employees without regard to the collective-bargaining process, from the NLRA, with its protections for employee self-organization and collective bargaining).

fore entirely appropriate for us to take that focus on joint employee action as the touchstone for our analysis of what kinds of activities we must find within the scope of Section 7 in order to effectuate the purposes of the Act. The definition of concerted activity which the Board provided in Meyers I proceeds logically from such an analysis insofar as it requires some linkage to group action in order for conduct to be deemed "concerted" within the meaning of Section 7.

B. Meyers I is Consistent with City Disposal

In Meyers I, the Board indicated that a serious problem with the analysis in Alleluia and its progeny was that its focus on the purpose or subject matter of a particular action--whether it was a subject with which a group was likely to be concerned--reflected the "mutual aid or protection" clause of Section 7 but had little apparent linkage to the notion of

action taken in "concert."[17] The Board noted that its pre-Alleluia cases had, with court approval, distinguished between the two clauses and regarded them as separate tests to be met in establishing Section 7 coverage; the Board determined it should return to this approach.[18] This approach is consistent with the groundwork laid by the Supreme Court in City Disposal.[19]

In City Disposal the Supreme Court addressed the question of whether an individual employee's invocation of a right contained in a collective-bargaining

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[17]268 NLRB at 495-496.

[18]Id. at 494-495, 496.

[19]465 U.S. at 830-831. It is also consistent with the analytical framework of Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), where the employees' distribution of a union newsletter was plainly "concerted activity," but the Court considered the separate question whether, given the subject matter of the newsletter, it could be said that the concerted activity was engaged in for "mutual aid or protection."

agreement constituted concerted activity within the meaning of Section 7. The Court answered this question in the affirmative and found reasonable the Board's long standing Interboro doctrine[20] recognizing as concerted an individual employee's reasonable and honest invocation of a collective-bargaining right.

The Court noted that the Board had relied on "two justifications" for its Interboro doctrine:

> First, the assertion of a right contained in a collective-bargaining agreement is an extension of the concerted action that produced the agreement, Bunney Bros. Construction, (139 NLRB 1516,) 1519 [(1962)]; and second, the assertion of such a right affects the rights of all employees covered by the collective-bargaining agreement. Interboro Contractors, supra, at 1298.[21]

In the Court's only subsequent reference to the second justification, it described the effect that a single employee's invocation of a contract right exerts on the rights of other employees as the

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[20] Interboro Contractors, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

[21] 465 U.S. at 829.

> ... type of generalized effect (that is) sufficient to bring the actions of an individual employee within the "mutual aid or protection" standard, regardless of whether the employee has his own interests most immediately in mind.[22]

The Court then proceeded to an analysis of the "concerted activity" issue that, as we explain below, relies only on the first justification--that the individual's action is an extension of the concerted action that produced the agreement.

It is noteworthy that the second justification--affecting the rights of others--which the Court linked to the "mutual aid or protection" clause closely resembles the reasoning that underlay the Board's decision in Alleluia to deem as "concerted" activity an individual employee's action to enforce "statutory provisions relating to occupational safety designed for the benefit of all employees" in the absence of employee disavowal of

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[22]Id. at 830 (citation omitted).

such action.[23] While it would be going too far to say that the Court in City Disposal held that questions of who is benefited by an action to go to the "mutual aid or protection" clause only and not to the "concerted" activity element of Section 7, it is surely reasonable to conclude from the Court's analysis that it deems some linkage to collective employee action to be at the heart of the "concertedness" inquiry.

Thus, in considering what constitutes "concerted activities" under Section 7, the Court stated that the inquiry was one in which it must determine "the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees."[24] The Court approved the Interboro doctrine because it found an individual employee's invocation

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[23] 221 NLRB at 1000.

[24] 465 U.S. at 831.

of a collective-bargaining right to be "unquestionably an integral part of the process that gave rise to the agreement."[25] The Court reviewed the stages of the process, including the organization of the union, the negotiation of the collective-bargaining agreement, and the assertion of rights under the agreement as "a single, collective activity."[26] The Court concluded: "A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense."[27] Further support was found from the fact that joining and assisting a labor organization can be engaged in by an individual employee, whose action, nevertheless, bears an integral relationship to the actions of other employees. It

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[25]Ibid.

[26]Id. at 831-832.

[27]Id. at 832.

was recognized that the actions of the individual employee engaged in concerted activity might be remote in time and place from group action[28] but, at some point, there would be an outer limit to concerted activity in order to be faithful to the collective-action component of Section 7.[29]

Even though the precise issue concerning the scope of "concerted activities" now before us was not before the Supreme Court in City Disposal,[30]

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[28]Id. at 832-833.

[29]Id. at 833 fn. 10.

[30]Id. at 829 fn. 6. In Meyers I we specifically distinguished the issues presented by the Interboro doctrine from those presented here. 268 NLRB at 496. The Court in City Disposal agreed with that distinction, stating in fn. 6 of its decision, "The Board, however, distinguished that case from the cases involving the Interboro doctrine, which is based on the existence of a collective-bargaining agreement. The Meyers case is thus of no relevance here." The Court did, however, favorably cite Meyers I in its preliminary analysis of Sec. 7.

several guiding principles concerning what might constitute a permissible definition of "concerted activities" emerge. First, a definition of concerted activity could include some, but not all, individual activity. Both the majority and dissenting opinions in City Disposal approve a definition of concerted activity encompassing individual employee activity in which the employee acts as a representative of at least one other employee,[31] whereas only the majority opinion endorses the inclusion of the individual activity reflected by the Interboro doctrine. Second, inasmuch as an essential component of Section 7 is its collective nature, a definition of concerted activity should reflect this component as well. Third, like the Board in Meyers I, the Court in City Disposal separated the concept of "concerted activities" and "mutual aid or

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[31] Id. at 831, 846-847.

protection," thereby giving its imprimatur to the reasonableness of such a separation of the two concepts underlying Section 7.[32]

Keeping these objectives in mind, we have scrutinized the Meyers I definition of "concerted activities." In our view, the Meyers I definition strikes a reasonable balance. It is not so broad as to create redundancy in Section 7, but expansive enough to include individual activity which is connected to collective activity, which lies at the core of Section 7.

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[32] Id. at 830-831. In this regard, the Court concluded first that asserting a collective-bargaining right was for "mutual aid or protection" before considering whether an individual who does so alone engages in concerted activity. If the Court did not consider the two concepts underlying Sec. 7 as distinct, then the Court's remaining analysis pertaining to the concept of "concerted activities" would have been superfluous.

C. "Individual Activity" Under the Meyers I Standard

In Meyers I, the Board adopted the following definition of the term "concerted activities": "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[33] The Meyers I definition expressly distinguishes between an employee's activities engaged in "with or on the authority of other employees" (concerted) and an employee's activities engaged in "solely by and on behalf of the employee himself" (not concerted). There is nothing in the Meyers I definition which states that conduct engaged in by a single employee at one point in time can never constitute concerted activity within the meaning of Section 7. On the contrary,

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[33] 268 NLRB at 497.

the Meyers I definition, in part, attempts to define when the act of a single employee is or is not "concerted."

The court of appeals raised several questions as to whether individual activity is indeed covered by the Meyers I definition. We interpret the court's opinion as inviting us to respond to the concerns raised by those questions.

1. The court queried whether Meyers I is consistent with NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442 (6th Cir. 1981), a case which the Prill court stated was "a case quite similar on its facts to Meyers." 755 F.2d at 953 fn. 72. We respectfully point out that Lloyd A. Fry and the instant case are factually distinguishable in a critical respect. In Lloyd A. Fry, where concerted activity was established, the record was replete with instances in which the discharged employee (Varney) acted on a collective basis with

other employees preceding his discharge. Thus, as found by the Sixth Circuit, Varney engaged in "numerous discussions" with his fellow drivers regarding the safety of the employer's trucks and Varney and a fellow employee (Wade) collectively met with management representatives specifically to discuss solutions to truck maintenance problems that had engendered numerous complaints by other employees. In the instant case, there is no record evidence whatsoever that employee Prill at any relevant time or in any manner joined forces with any other employee, or by his activities intended to enlist the support of other employees in a common endeavor. Since Lloyd A. Fry is not on all fours with the instant case, a different result is not inconsistent with the results reached here.

2. The court of appeals also noted

that, in previous Board cases,[34] concerted

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[34]In Charles H. McCauley Associates, Inc., 248 NLRB 346 (1980), enfd' 657 F.2d 685 (5th Cir. 1981), an employee spoke to his fellow employees and apprised them of his intention to seek improvements in certain working conditions. The employee then expressly informed the employer of his intended group action, i.e., to discuss these matters with his coworkers and, possibly, with a union. The employer forbade the employee to discuss these matters with his coworkers or with a union and terminated him. In Hugh H. Wilson Corp., 171 NLRB 1040 (1968), enfd. 414 F.2d 1345 (3d Cir. 1969) cert. denied 397 U.S. 935 (1970), a group of employees attended an employer-sponsored meeting and vocally took issue with the employer's administration of an employee profit-sharing plan. The employees subsequently held a group discussion about the profit-sharing plan. In Guernsey-Muskingum Electric Coop., Inc., 124 NLRB 618 (1959), enfd. 285 F.2d 8 (6th Cir. 1960), three employees made a common decision, following group discussions among all three, that each would take their complaint to a high management representative. In Carbet Corp., 191 NLRB 892 (1971), enfd. 80 LRRM 3054 (6th Cir. 1972), an employee complained to management about the employer's inadequate ventilation system. The employee's complaints had been instrumental in bringing about a union campaign and the employee previously had spoken to other employees about the ventilation problem, one of whom had replied, "We've got to get a union, and maybe they could help us get it (an improved ventilation system)." 191 NLRB at 898.

activity was found where an individual, not a designated spokesman, brought a group complaint to the attention of management. The court questioned whether Meyers I is consistent with those cases. We discern no basis upon which the Meyers I standard deviates from those cases in the manner suggested by the court's question. Indeed, Meyers I recognizes that the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. When the record evidence demonstrates group activities, whether "specifically authorized" in a formal agency sense, or otherwise, we shall find the conduct to be concerted. In Board cases subsequent to Meyers I, we have followed that principle.[35] The Board

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[35]See Walter Brucker & Co., 273 NLRB 1306 (1984); Advance Cleaning Service, 274 NLRB No. 141 (Mar. 13, 1985); Spencer Trucking Corp., 274 NLRB No. 206 (Mar. 29, (continued...)

decisions in Mannington Mills,[36] and Allied Erecting Co.,[37] cited by the court of appeals, are not contrary to that principle.

In Mannington Mills, supra, the Board majority found that employee Frie was not acting in concert with any other employee when he threatened a work stoppage in protest of certain extra work assignments. Former Member Zimmerman, dissenting on other grounds, did not take issue with the majority finding that Frie acted alone in making this threat.[38] According to the Board's findings, there was no evidence to show (1) that any employee had authorized

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[35](...continued)
1985); Dayton Typographical Service, 273 NLRB 1205 (1984), enfd. in relevant part 778 F.2d 1188 (6th Cir. 1985).

[36]272 NLRB 176 (1984).

[37]270 NLRB 277 (1984).

[38]See dissenting opinion of former Member Zimmerman in Mannington, 272 NLRB at 177-178.

or instructed Frie to make the threat;[39] (2) that any employee had discussed with him the possibility of a work stoppage; or (3) that any employee was aware of and supported Frie's threat. The Board majority suggested that had any one of these facts which was missing from the record been present, Frie's threat may have been found to be concerted.

In Allied Erecting Co., supra, an employee contacted a representative of an employer (other than his immediate employer) to inquire whether employees on the project were covered by a contract. No evidence was presented that other employees in any way supported the employee's visit and the employee himself

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[39]According to Frie's version, which was not specifically credited, other employees may have indicated to him their objection to perform certain work. The Board was unwilling to equate possible declarations of this kind with authorization, formal or informal, to Frie to pursue the action which he took.

equivocated as to whether he even told any other employee about the prospective visit. The employee was fired because he had spoken to the other employer about his employer not paying union scale wages as required by the project contract. Concerted activity was not found.

In both Mannington and Allied, the circumstances failed to establish that the individual employee acted other than solely by and on behalf of himself. Neither case stands for the proposition that a group spokesman must be "specifically authorized" by the group to act in some formal declarative manner. Rather, there was not even a general awareness on the part of the group as to the intended action of the individual employee.

In Walter Brucker & Co., supra, which issued subsequent to Meyers I, the Board found that an individual employee acted on the authority of other employees within

the meaning of Meyers I when that employee discussed with other employees a common wage complaint. The conduct was deemed concerted under the circumstances because a second employee refrained from making his own wage complaint, relying instead on the first employee to resolve the matter. Although there was no "specific authorization" in the formal agency sense, the record established that the employees acted as a group even though only the first employee further pursued the wage complaint, while the second employee was only generally aware that the first employee would take whatever action he deemed necessary to obtain the information concerning their wage dispute.

3. As to the court's question regarding Mushroom Transportation Co. v. NLRB,[40] the court stated that "[it] is not clear, however, that the Meyers standard

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[40] 330 F.2d 683 (3d Cir. 1964).

would protect an individual's efforts to induce group action."[41] To clarify, we intend that Meyers I be read as fully embracing the view of concertedness exemplified by the Mushroom Transportation line of cases. We reiterate, our definition of concerted activity in Meyers I encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.

In Meyers I we noted with approval Root-Carlin, Inc., 92 NLRB 1313, 1314 (1951), a decision antedating Meyers I by 33 years, wherein the Board recognized that:

> Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an

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[41] 755 F.2d at 955.

> indispensable preliminary step to employee self-organization.

More recently, in Vought Corp., 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986), the Board noted with approval the Third Circuit's comments in Mushroom Transportation, supra, that:

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Ontario Knife Co. v. NLRB,[42] relied on by the Board in support of the Meyers I test, indicates that individual activity

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[42] 637 F.2d 840 (2d Cir. 1980). In this case, the Second Circuit found the action of an individual employee in walking off the job in protest of a work assignment was not concerted in the absence of evidence that other employees participated in or approved the walkout or evidence that the employee looked toward group action in walking off the job.

"looking toward group action"[43] is deemed concerted. Although Meyers I did not expressly endorse Mushroom Transportation, it did so implicitly by its reliance on Ontario Knife Co., supra. To recall, the Board cautioned in Meyers I that the definition formulated was by no means exhaustive and that a myriad of factual situations would arise calling for careful scrutiny of record evidence on a case-by--case basis. The record facts of the case simply did not warrant an examination of the viability of Mushroom Transportation, supra.

D. Contract Rights Versus Statutory Rights

Finally, because the Alleluia Cushion doctrine at its origin and in its most appealing form concerns a single employee's invocation of a statute enacted

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[43] 637 F.2d at 844-845 (quoting Mushroom Transportation Co. v. NLRB, supra, 330 F.2d at 685).

for the protection of employees generally, we must consider whether any linkages to concerted activity may be discerned in such an individual employee act or whether overall public policy considerations should move us to protect even purely individual activity that is aimed at securing employer compliance with other statutes that benefit employees.

As explained in our discussion of City Disposal, supra, the Supreme Court regarded proof that an employee action inures to the benefit of all simply as proof that the action comes within the "mutual aid or protection" clause of Section 7. It found "concerted" activity because the employee's invocation of the contract was an extension of the collective employee activity that produced the contract. We freely acknowledged that efforts to invoke the protection of statutes benefiting employees are efforts

engaged in for the purpose of "mutual aid or protection." As the Supreme Court noted in Eastex, Inc. v. NLRB, 437 U.S. 556, 565, 566 (1978), "labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context"; and the Court thus observed that employees' resort to "administrative and judicial forums" and their "appeals to legislators to protect their interests as employees are within the scope of (the 'mutual aid or protection') clause."

But this does not resolve the separate "concerted activity" issue.[44] As the Board noted in Meyers I, the courts of appeals have rejected the Alleluia

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[44]There was no question whether concerted activity was present in Eastex, since the activity there was employees' request that they be allowed to distribute on the employer's premises a union newsletter that discussed minimum-wage laws and a pending proposal concerning a state "right-to-work" law.

doctrine of constructive concerted activity stemming from an employee's invocation of a statute. We reiterate the comments of the Fourth Circuit in Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 309 (4th Cir. 1980):

> The only courts which have considered it (the theory of presumed "concerted activity") have flatly rejected any rule that where the complaint of a single employee relates to an alleged violation of federal or state safety laws and there is no proof of a purpose enlisting group action in support of the complaint, there is "constructive concerted action" meeting the threshold requirement under Section 7.

Can an employee's invocation of a statute be regarded as the extension of "concerted activity" in any realistic sense? Certainly the activity of the legislators themselves cannot be said to be concerted activity within the contemplation of the Wagner Act. And while there may be concerted activity in the lobbying process preceding the passage of such legislation, the linkage is at-

tenuated; any such activity is far removed from the particular workplace, and the critical link between lobbying and enforcement of the law is the legislative process itself, which is not a part of any ongoing employee- generated process such as the negotiation and administration of collective- bargaining agreements. If it was appropriate for the Supreme Court in Eastex to consider that "at some point" the relationship between some kinds of concerted activity and "employees' interests as employees" may be "so attenuated" that it cannot "fairly be deemed to come within the 'mutual aid or protection' clause," then it is surely appropriate to conclude that at some point the relationship between some kinds of individual conduct and collective employee action may be "so attenuated" as not to mandate inclusion of that conduct in the "concerted activity" clause. Indeed, the

Court in City Disposal made that very point, noting that

> ... at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity.

465 U.S. at 833 fn. 10. Furthermore, a doctrine that rested on the presence of concerted employee activity prior to passage of a particular law would require a choice between two unattractive positions: either we would have to indulge in a presumption that all statutes that benefit employees are the product of concerted employee activity or we would have to make factual inquiries into who had worked for passage of the law in question.

In short, in construing Section 7 we are not holding that employee contract rights are more appropriate subjects for joint employee action than are rights granted by Federal and state legislation

concerning such matters as employee safety. We merely find that invocation of employee contract rights is a continuation of an ongoing process of employee concerted activity, whereas employee invocation of statutory rights is not. We believe that we best effectuate the policies of the Act when we focus our resources on the protection of actions taken pursuant to that process.

With respect to the public policy question, we must simply note that, although it is our duty to construe the labor laws so as to accommodate the purposes of other Federal laws (see, e.g., Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892-894 (1984); Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942)), this is quite a different matter from taking it upon ourselves to assist in the enforcement of other statutes. The Board was not intended to be a forum in which to rectify

all the injustices of the workplace. In Meyers I, the Board noted that although we may be outraged by a respondent who may have imperiled public safety, we are not empowered to correct all immorality or illegality arising under all Federal and state laws (268 NLRB at 499). We note Judge Bork's comments in his dissenting opinion in this case that employee Prill may have a cause of action under state law,[45] and that the policy interests underlying his colleagues' suggestion should be addressed to the legislature or to the state courts. We further note that section 405 of the Surface Transportation Assistance Act of 1982, although enacted after Prill's discharge and not available

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[45]Prill filed a complaint with the Michigan Department of Labor alleging that his discharge violated the Michigan Occupational Safety and Health Act. On 5 November 1979 the Department dismissed Prill's complaint, finding he failed to satisfy his burden of establishing that his discharge violated the Michigan statute.

to him, expressly prohibits the discharge, discipline, or imposition of other adverse treatment because an employee has filed a complaint or instituted any proceeding relating to motor carrier safety or because the employee has refused to drive a vehicle in certain circumstances. That statute provides for complaint procedures before the United States Department of Labor.

E. The "Chilling Effect" Question

We do not view Prill's discharge as having a "chilling effect" on the exercise of Section 7 rights by other employees. In City Disposal, the Court noted that the discharge of an employee who is not himself involved in concerted activity may violate Section 8(a)(1) if the employee's actions "are related to other employees' concerted activities in such a manner as to render his discharge an interference or restraint on those activities." 465 U.S.

at 833 fn. 10. Here, employee Prill acted alone and without an intent to enlist the support of other employees. The record fails to establish that his purely individual activities were "related to other employees' concerted activities" in any demonstrable manner. Even assuming arguendo that an otherwise lawful discharge may have some remote incidental effect on other employees, such an incidental effect does not render the discharge unlawful. See Panaderia Sucesion Alonso, 87 NLRB 877, 881-882 (1949). Compare Parker-Robb Chevrolet, Inc., 262 NLRB 402, 404 (1982), enfd. sub nom. Automobile Salesmen Local 1095 v. NLRB, 711 F.2d 383 (D.C.Cir. 1983).

Conclusion

Accordingly, we adhere to the definition of concerted activity set forth in Meyers I as a reasonable construction of the Act. As we find that employee Prill

acted alone and did not engage in concerted activities within the meaning of Section 7, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington D.C. 30 September 1986

Donald L. Dotson, Chairman

Marshall B. Babson, Member

James M. Stephens, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KENNETH A. PRILL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 86-1675

December 21, 1987

Petitioner Kenneth Prill seeks review of a supplemental decision by the National Labor Relations Board ("NLRB" or "Board") finding that Prill's employer, Meyers Industries, Inc. ("Meyers"), did not commit an unfair labor practice when it fired Prill from his job as a truck driver. Meyers Indus., Inc., 281 N.L.R.B. No. 118 (Sept. 30, 1986) ("Meyers II"). Prill comes to this court for the second time, having previously petitioned for review after the Board dismissed his

identical complaint three years ago in Meyers Industries, Inc., 268 N.L.R.B. 493 (1984) ("Meyers I"). Meyers I held that Prill's individual actions arising out of his own complaints about the safety of his truck were not "concerted" for the purposes of section 7 of the National Labor Relations Act ("NLRA" or "Act"), which protects the right of employees to "engage in...concerted activities for [their]...mutual aid or protection." 29 U.S.C. § 157 (1982). On petition for review of that order, in Prill v. NLRB, 755 F.2d 941 (D.C.Cir. 1985) ("Prill I"), we remanded to the Board for further consideration. Now before us is the Board's second decision, Meyers II, in which the Board has adhered to its initial determination in Meyers I but modified its reasoning in light of our opinion. Since we conclude that this time the Board's position constitutes a reasonable inter-

pretation of the NLRA to which we must defer, we affirm the Board's decision in Meyers II.

I.

The facts of this case are not in controversy, and they are fully presented in Prill I, 755 F.2d at 943-45. Briefly, they are as follows: Kenneth Prill was, beginning in April 1979, a truck driver for Meyers, a Michigan-based aluminum boat manufacturer. Having had difficulties with the brakes on his company-issued truck, Prill made several complaints to Meyers personnel--to his supervisor, David Faling, to the mechanic and to the company president, Alan Beatty.

In June 1979, another truck driver, Ben Gove, drove Prill's truck on a long trip. After his return, Gove reported having had brake and steering problems with Prill's truck. While Prill was present in the office, Gove told Faling

that he would not drive the truck until the brakes were repaired, and Faling promised to do so.

Later, in early July 1979, Prill was driving his truck through Tennessee and had an accident due in part to the faulty brakes. After unsuccessfully trying to have the state public service commission inspect the damaged tractor and trailer, Prill contacted Beatty, who asked that Prill have the truck towed home to Michigan despite Prill's protestation that it was not safe to move. Beatty requested that Prill chain the tractor and trailer together for moving; Prill refused, asserting that cracks in the areas where the truck and trailer were hitched together would make such an operation unsafe. Instead, Prill had the Tennessee Public Service Commission arrange for an official inspection, which led to a report finding the brakes unsafe and the hitch

area damaged. The Tennessee authorities then issued a citation prohibiting the moving of the truck. Two days later, Prill was fired because, in the words of a Meyers officer, "we can't have you calling the cops like this all the time." Prill I, 755 F.2d at 945 (footnote omitted).

In Prill I, we held that the Board's new, more narrow interpretation of concerted activity in section 7 was not, contrary to the Board's suggestion in Meyers I, compelled by the NLRA. 755 F.2d at 942. The Board's misreading of the law led us to remand the case for a supplemental decision by the NLRB; we directed the Board to rely on its own expertise in labor relations rather than on a simplistic reading of the NLRA. Because we remanded on this basis, we did not reach in Prill I two issues now before us: Is the new Meyers standard a reasonable interpretation of the NLRA; and if so, was

it properly applied to the petitioner in this particular case?

II.

In Meyers II, the NLRB adheres to its legal position in Meyers I, in which it held that an employee's action may be concerted for the purposes of the NLRA only if the action is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Meyers I, 268 N.L.R.B. at 497 (footnote omitted). Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization...to bargain collectively...and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1982) (emphasis added). At the heart of this dispute is whether the safety complaints of a single employee acting on his own can constitute concerted activity

protected under the Act. Previously, under Alleluia Cushion Co., 221 N.L.R.B. 999 (1975), and its progeny, the efforts of a single worker to invoke state and federal laws regulating occupational safety were held protected activity under section 7. See Prill I, 755 F.2d at 945. The Board had determined that such complaints were "concerted" on the theory that the action of one individual bringing statutory safety concerns to light is presumed to assert the rights of all employees interested in safety. Alleluia, 221 N.L.R.B. at 1000. Put simply, the Board now rejects the theory animating Alleluia and its progeny. A worker no longer takes "concerted" action by himself unless he acts on the authority of his fellow workers. Unlike the Board's reasoning in Alleluia, the Board's new position is that the "concerted activity" prong and the "mutual benefit or protec-

tion" prong of section 7 are two distinct factual, inquiries that are to be analyzed separately. Concerted action cannot be imputed from the object of the action. In other words, if a worker takes action by himself without contacting his fellow employees, even though he has a desire to help all workers, not just himself, he will not have satisfied the concerted action requirement. As under the old standard, however, a worker is still deemed to have taken concerted action when he acts with the actual participation or on the authority of his coworkers. Meyers II, 281 N.L.R.B. No. 118 at 12-16.

Before we reach the question left open in Prill I and reasserted by the petitioner--whether the Meyers standard is inconsistent with the NLRA--we ask whether the Board has cured those defects identified in Prill I. As we noted, the Board in Meyers I suggested that its new

position was actually mandated by the NLRA, and this we concluded was a misreading of the law. Prill I, 755 F.2d at 950. In contrast to its previous position, the NLRB in Meyers II made a determination that the Meyers I interpretation of what is concerted is not actually required by the NLRA but rather is "most responsive to the central purposes for which the Act was created." Meyers II, at 4. The Board further contends that its new position, though not required, "proceeds logically" from its analysis of the legislative history. Id. at 7. Although now recognizing that the statute could be read to support either the Alleluia or Meyers interpretation of concerted activity, the Board concludes that Meyers is the better interpretation, drawing both upon its reading of the statute and its expertise in administering the statute.

The Board also explained why it does

not believe that there would be a chilling effect on other workers if Prill were not reinstated. In NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 104 S.Ct. 1505, 79 L.Ed. 2d 839 (1984), the Supreme Court reasoned that there could be a violation of section 8(a)(1)[46] of the NLRA, which protects an employee from interference with his rights under section 7, where a company fired an employee whose actions were so related to other employees' concerted activities that the firing would interfere with or restrain those other concerted activities. City Disposal, 465 U.S. at 833 n. 10, 104 S.Ct. at 1512 n. 10. The Board found no such relationship between Prill's discharge and his fellow employees' concerted ac-

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[46]Section 8(a)(1) provides in full: It shall be an unfair labor practice for an employee--to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section [7] of this title. 29 U.S.C. § 158(a)(1) (1982).

tivities, and the record does not indicate otherwise.

Finally, the Board responds to our concerns expressed in Prill I regarding the scope of individual activity that would qualify as concerted. Compare Prill I, 755 F.2d at 953-56 with Meyers II, at 11-16. The Board has clarified how its new standard comports with previous decisions in the courts of appeals and prior Board decisions. For example, the Board answers our question whether Meyers II is consistent with cases like Mushroom Transportation Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964). In that case, the court reasoned that mere talk is sufficient to put a worker in concert with his fellow employees as long as the conversation is taken before the worker acts and contemplates group action. Id. at 685. The Board harmonizes its new standard with the Third Circuit's decision in Mushroom

Transportation by emphasizing its intent to protect "individual employees [who] seek to initiate or to induce or to prepare for group action" and "individual employees bringing truly group complaints to the attention of management." Meyers II, at 15. We accept the Board's explanation that Meyers II adopts the reasoning of Mushroom Transportation. Moreover, we are satisfied that the Board has not repeated its past error by suggesting that its new definition of concerted action is merely a return to "'the standard on which the Board and courts relied before Alleluia.'" Prill I, 755 F.2d at 953 (quoting Meyers I, 268 N.L.R.B. at 496). The Board has explained its position in light of these cases, and, without endorsing each interpretation, we find the discussion a helpful explication of the new standard.

Having concluded that Meyers II is

fully responsive to our previous opinion, we address petitioner's argument that the Board's interpretation of section 7 is inconsistent with the NLRA. We do not think it is. The Supreme Court has determined that nothing in the legislative history of section 7 "specifically expresses the understanding of Congress in enacting the 'concerted activities' language." City Disposal, 465 U.S. at 834, 104 S.Ct. at 1512. It is clear that "Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." Id. at 835 (emphasis added). By requiring that workers actually band together, the NLRB has adopted a reasonable--but by no means the only reasonable--interpretation of section 7. The Board reads the words "concerted

activity" to "encompass[][only] those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." Meyers II, at 15. We believe this position is consistent with the history of the Act.[47]

Petitioner argues that, in light of City Disposal, Meyers II is unreasonable in requiring a direct link between the actions of an individual employee and the actions or approval of his co-workers before the individual's actions will be

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[47]The source of the section 7 "concerted activities" language is the Norris-La Guardia Act, which declared that "the individual...worker shall be free from the interference, restraint, or coercion, of employers...in self-organization or in other concerted activities for the purposes of collective bargaining or other mutual aid or protection." 29 U.S.C. § 102 (1982), quoted in City Disposal, 465 U.S. at 834-35, 104 S.Ct. at 1513.

considered "concerted." In City Disposal, the Court upheld the Interboro doctrine, in which the Board finds an employee's activities concerted where the employee asserts rights under a collective bargaining agreement whether on his own or in actual concert with others. City Disposal, 465 U.S. at 830-32, 104 S.Ct. at 1510-11. The rationale for the Court's decision was that "when an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone." Id. at 832, 104 S.Ct. at 1511. The Supreme Court simply recognized that a worker's actions are concerted when tied to the actions of his fellow employees, and in City Disposal, the collective bargaining agreement itself provided the bond between one worker and another. Id. at 830-37, 104 S.Ct. at 1510-14. City Disposal neither required nor precluded treating workplace-related statutory

rights as establishing, without more, the necessary bond among workers. In Meyers II, the Board distinguished contractual rights under collective bargaining agreements from workplace-related statutory rights, holding that the former, but not the latter, demonstrated the requisite bond. The Meyers II rejection of the broader (Alleluia) interpretation, we conclude, is not inconsistent with the Interboro doctrine upheld in City Disposal, nor is it otherwise unreasonable. We therefore defer to the Board in accordance with Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 864, 104 S.Ct. 2778, 2792, 81 L.Ed.2d 694 (1984).

Prill claims that even if Meyers II is a reasonable standard, it was not applied correctly. Based on our review of the record, we conclude that there was substantial evidence to support the

Board's finding that Prill acted on his own, without inducing or preparing for group action. We agree with the Board that Prill's actions were not in concert with Gove or others: "Prill merely overheard Gove's complaint while in the office on another matter, and there is no evidence that anything else occurred." Meyers I, at 498. Despite the fact that there might be a benefit to Prill's fellow employees from his actions, Prill acted alone when he complained to his employer and the Tennessee state officials, and when he refused to tow the unsafe truck. Had Prill simply gotten together with his co-workers to complain about the violation of statutory safety provisions, he would have been protected from dismissal under the Board's current reading of section 7, which requires that both the "mutual aid or protection" and the "concerted activity" prongs be satisfied. Recognizing

the singularity of Prill's case, we affirm the Board's decision for the reasons stated, and as adequately supported by substantial evidence in the record. See International Ladies Garment Workers v. NLRB, 463 F.2d 907, 919 (D.C.Cir. 1972).

Since the Board's interpretation of "concerted activity" is reasonable, its judgment is hereby, Affirmed.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MEYERS INDUSTRIES, INC.

and

KENNETH P. PRILL, an Individual

Case 7-CA-17207

Dated, Washington, D.C. 6 January 1984

DECISION AND ORDER

Donald L. Dotson, Chairman

Robert P. Hunter, Member

Patricia Diaz Dennis, Member

On 14 January 1981 Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed cross-exceptions with supporting briefs, after which the General Counsel filed a brief in response to the Respondent's exceptions. The Board has considered the decision and the record in light of the exceptions and briefs and has

decided to affirm the judge's rulings,[1]

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[1]On 4 November 1980, after the hearing and before the judge's decision, the General Counsel, with the Charging Party's concurrence, moved to amend the complaint to include an additional allegation that the unlawful nature of Prill's discharge is supported by Sec. 502 of the National Labor Relations Act, as amended. The relevant portion of that section states: "(N)or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

The judge, after considering the arguments of all parties, denied the General Counsel's motion by telegram of 11 November 1980. The General Counsel and the Charging Party cross-except. We note that counsel for the General Counsel engaged in lengthy argument at the hearing concerning the theory of her case both before as well as after the presentation of evidence, but gave no indication that Sec. 502 formed the basis for any portion of the General Counsel's case. In addition, although counsel for the Charging Party took the position at the hearing that Sec. 502 was applicable, counsel for the General Counsel thereafter reiterated that the theory of her case rested on Alleluia Cushion Co., 221 NLRB 999 (1975), and at no time adopted the Charging Party's position. Thus, although we agree with the judge that the General Counsel's motion to amend the complaint should be denied, we do so for the reason that the General Counsel neither raised nor litigated the Sec. 502 issue at the

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findings,[2] and conclusions only to the extent consistent with this Decision and

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[1](...continued)
hearing. Accordingly, we affirm the judge's ruling and therefore do not reach the issue discussed in fn. 6 of the attached decision of whether Sec. 502 protects an employee in the circumstances of this case.

[2]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Respondent also asserts that the judge's decision is the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in NLRB v. Pittsburgh Steamship Co., 337 U.S. 656, 659 (1949), "(T)otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." See generally Jack August Enterprises, 232 NLRB 881 (1977).

Order.[3]

Relying on Alleluia Cushion Co., 221 NLRB 999, the judge concluded that the Respondent violated Section 8(a)(1) of the Act when it discharged employee Kenneth P. Prill because of his safety complaints and his refusal to drive an unsafe truck after reporting its condition to the Tennessee Public Service Commission. Upon careful consideration, and for the reasons set forth below, we reject the principles the Board adopted in Alleluia, and do not

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[3]The Charging Party urges, as part of its cross-exceptions, that it be awarded a reasonable attorney's fee for this litigation. When a respondent's defense is dependent upon resolutions of credibility and hence is "debatable" rather than "frivolous," the Board has consistently refused to award litigation costs, even if the respondent has "engaged in 'clearly aggravated and pervasive misconduct,' or in the 'flagrant repetition of conduct previously found unlawful.'" Heck's Inc., 215 NLRB 765, 767 (1974); see also Tidee Products, 194 NLRB 1234 (1972). Upon a review of the record, we cannot say that Respondent's defenses were frivolous. Accordingly, we deny the Charging Party's request for reasonable attorney's fees.

agree with the view of protected concerted activity which that decision and its progeny advance. We, therefore, find that Respondent did not violate Section 8(a)(1) by discharging Prill.

I. THE CONCEPT OF PROTECTED CONCERTED ACTIVITY

The concept of concerted action has its basis in Section 7 of the Act, which states in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection....

Although the legislative history of Section 7 does not specifically define "concerted activity," it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal. The immediate antecedent of Section 7 was Section 7(a) of the National

Industrial Recovery Act of 1933,[4] the purpose of which was, as then Congressman Boland suggested, to "afford (the laboring person) the opportunity to associate freely with his fellow workers for the betterment of working conditions .... (and it) primarily creates rights in organizations of workers."[5]

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[4]48 Stat. 195, 198.

See also § 2 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. s 102. The Supreme Court has stated that "Congress modeled the language of s 7 after that found in s 2 of the Norris-LaGuardia Act ... which declares that it is the public policy of the United States that 'workers shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of ... representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. ...'" Eastex, Inc. v. NLRB, 437 U.S. 556, 565 fn. 14(1978).

[5]79 Cong.Rec.H 2332 (daily ed. February 20, 1935) (statement of Rep. Boland), reprinted in II NLRB, Legislative History of the National Labor Relations Act of 1935, at 2431-32 (1935).

Boland's analysis of the "collectivist" antecedents of what became Sec. 7 of the

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A review of the language of Section 7 leads to a similar united-action interpretation of "concerted activity." The wording of that section demonstrates that the statute envisions "concerted" action in terms of collective activity: the formation of or assistance to a group, or action as a representative on behalf of a group. Section 7 limits the employee rights it grants to the examples of concerted activities specifically enumerated therein--"self-organization"; forming, joining, or assisting labor organizations; and bargaining collectively through representatives--and to engaging in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (Emphasis added.) Thus,

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[5](...continued)
Act was recognized by others. See, e.g., William H. Spencer, Collective Bargaining Under Section 7(a) of the National Industrial Recovery Act 3-6 (1935).

the statute requires that the activities in question be "concerted" before they can be "protected." Indeed, Section 7 does not use the term "protected concerted activities," but only "concerted activities."[6]

Consistent with this interpretation, the Board and courts before Alleluia generally analyzed the concept of protected concerted activity by first considering whether some kind of group action occurred and, only then, considering whether that action was for the purpose of mutual aid

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[6]The Act does not protect all concerted activity. It is not a violation of the Act to restrain or coerce an employee because he engages in concerted activity that is not protected--either, for example, because such activity contravenes another section of the Act or another statute, or because it was not engaged in "for the purpose of collective bargaining or other mutual aid or protection." See Eastex, 437 U.S. at 568 fn. 18. See generally Gregory, Unprotected Activity and the NLRA, 39 Va.L.Rev. 421 (1953).

or protection.[7] In a 1951 case, Root-Carlin, Inc.,[8] the Board addressed the issue of what was required in order for activity to be "concerted." The case involved only conversation among employees about the need for a union in their workplace. The Root-Carlin Board stated:

> Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization. (Emphasis added. 92 NLRB at 1314.)

Significantly, the Board described concerted activity in terms of interaction among employees.

Several years later, the Board again

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[7]See, e.g., Texas Textile Mills, 58 NLRB 352 (1944); Hymie Schwartz d/b/a Lion Brand Mfg. Co., 55 NLRB 798 (1944), enfd. in relevant part 146 F.2d 773 (5th Cir. 1945); Globe Co., 54 NLRB 1 (1943); M.F.A. Milling Co., 26 NLRB 614 (1940), enfd. in relevant part 115 F.2d 140 (8th Cir.).

[8]92 NLRB 1313 (1951).

considered what constituted concerted activity in Traylor-Pamco.[9] That case involved the discharge of two men who consistently ate their lunch in the "dry shack" even during a concrete pour, while everyone else ate in the less pleasant surroundings of the tunnel so as to minimize "downtime." The trial examiner, with Board approval, declined to find the employees' refusal to eat in the tunnel to be concerted, stating: "There is not even the proverbial iota of evidence that there was any consultation between the two in the matter, that either relied in any measure on the other in making his refusal, or that their association in refusing to eat in the tunnel was anything but accidental." 154 NLRB at 388. Thus, in Traylor-Pamco, the Board continued to define concerted activity in terms of

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[9]154 NLRB 380 (1965).

employee interaction in support of a common goal.

Thereafter, the Board decided Continental Mfg.,[10] in which employee Ramirez prepared and signed, on her own, a letter that she handed to respondent's owner. The letter stated that a majority of employees were disgusted with their treatment, that a supervisor played favorites, and that a janitor was needed for the women's bathroom. The letter concluded, "We all want to continue working here with you; please help us to improve our working conditions." The Board reversed the trial examiner's finding that Ramirez' letter constituted concerted activity, stating:

> The letter, which was directed only to the Respondent, was prepared and signed by Ramirez acting alone. She did not consult with ... any other employee, or the Union about the grievances therein stated or her

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[10]155 NLRB 255 (1965).

> intention of sending the letter to DeSantis (an owner of respondent). There is no evidence that the criticisms in the letter reflected the views of other employees, nor is there evidence that the letter was intended to enlist the support of other employees. This letter received no support from union representatives .... (155 NLRB at 257.)

Once again, the Board defined concerted activity in terms of interaction among employees.[11]

In recent years, but before Alleluia, the Board often decided the circumstances under which apparently individual activity may properly be characterized as "concerted." One of these cases, G.V.R., Inc.,[12] is factually indistinguishable from Alleluia, but equivocal in its reasoning. Glace and Curry were two

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[11]The Board's analysis of the facts in Continental Mfg., which were similar to those in Alleluia, was directly contrary to the Alleluia Board's reasoning.

[12]201 NLRB 147 (1973) (former Chairman Edward Miller dissenting).

employees who reported to the United States Army and the Department of Labor that their employer forced them to "kickback" portions of their wages. The judge found that Glace and Curry were discharged in violation of Section 8(a)(1) of the Act because they concertedly made complaints to United States agencies about their wages, hours, and working conditions.[13] At footnote 2 of its decision, the Board majority noted:

> The Administrative Law Judge found, in substance, that even in the absence of concerted activity, "Public policy would be frustrated if employees ... could not, with full protection of the Act, make complaints to public agencies about wages, hours, etc., without fear of reprisals."

The Board majority specifically disavowed the judge's language, stating:

> We do not adopt this improper

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[13]The judge and the Board majority found evidence that Glace and Curry had actually acted in concert during the course of the investigation.

extension of our enunciated principle that it would be contrary to public policy to hold that the making of complaints to public authorities in the course of concerted activity removes the protection of the Act from the concerted activity .... (Emphasis in original. 201 NLRB 147 at fn. 2.)

Despite the Board's rejection of the judge's extension of the concept of concerted activity, the Board majority stated:

> We also find, in addition to these reasons (the evidence of Glace's and Curry's actual concerted activities), that an employee covered by a federal statute governing wages, hours, and conditions of employment who participates in a compliance investigation of his employer's administration of a contract covered by such a statute, or who protests his employer's noncompliance with the contract, is engaged in concerted activity for the mutual aid and protection of all the employer's employees similarly situated. (Emphasis added. 201 NLRB at 147.)[14]

Thus, with G.V.R., the Board ap-

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[14]The "contract" referred to in the decision was not a collective-bargaining agreement, but a contract for services entered into between respondent and the United States Army.

parently declined to extend its concept of concerted action as a matter of policy, but did so as a matter of law. The distinction is a difficult one to discern.

II. ALLELUIA, ITS PROGENY, AND THE DEVELOPMENT OF THE PER SE STANDARD OF CONCERTED ACTIVITY

With Alleluia, the transformed concept of concerted activity was at last revealed. In that case, maintenance employee Jack Henley registered safety complaints with respondent. Henley was later transferred to another facility,[15] where he encountered similar safety problems. Not satisfied with Alleluia's response to these problems, Henley wrote a letter of complaint to the California OSHA office (Occupational Safety and Health Administration), with a copy to respondent. The Board found no evidence that, before complaining to respondent or writing to California OSHA, Henley

[15]The transfer was not at issue.

discussed the safety problems with other employees, sought their support in remedying the problems, or requested assistance in preparing the letter. Henley accompanied the OSHA inspector on a plant tour and was discharged the following day.

The judge dismissed the complaint in its entirety, finding no outward manifestation of group action. The Board disagreed and found concerted activity. The Board reasoned from the premise that "(s)afe working conditions are matters of great and continuing concern for all within the work force." In support of that premise, the Board noted that both the Federal Government and the States had made known their concern with this area of industrial life through occupational safety and health legislation. The Board, therefore, reasoned that because Congress and the States made manifest the apparent

national will in the area of industrial safety, "the consent and concert of action emanates from the mere assertion of such statutory rights."

Under the Alleluia approach, an observable manifestation of "group will" in the workplace (as distinguished from the legislature) was no longer required to find concert of action. The existence of relevant legislation and its invocation by a solitary employee became sufficient to find concerted activity. The practical effect of this change was to transform concerted activity into a mirror image of itself. Instead of looking at the observable evidence of group action to see what men and women in the workplace in fact chose as an issue about which to take some action, it was the Board that determined the existence of an issue about which employees ought to have a group concern. Stated another way, under the

Alleluia analytical framework, the Board questioned whether the purpose of the activity was one it wished to protect and, if so, it then deemed the activity "concerted," without regard to its form. This is the essence of the per se standard of concerted activity. We emphasize that the Board, in Alleluia, presumed to divine the relevance of the safety issue to the "theoretical" employee group by pointing to the existence of legislation in the health and safety area. Alleluia's progeny, however, dropped even the requirement of legislative action, and the Board ultimately decided what ought to be the subject matter of working persons' concern when the statutory manifestation of such "group concern" was slim or nonexistent.[16]

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[16]In Air Surrey Corp., 229 NLRB 1064 (1977), enf. denied 601 F.2d 256 (6th Cir. 1979), and Pink Moody, Inc., 237 NLRB 39 (1978), Alleluia was expanded to include
(continued...)

Another aspect of the Alleluia doctrine warrants scrutiny. Perhaps in an attempt to retain some element of the previous requirement of observable evidence of group support, the Board stated:

> Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted. [Emphasis added. 221 NLRB at 1000.]

This is yet another mirror image turn that the definition of concerted activity has taken. In the past, we required the

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[16](...continued)
state banking statutes and motor vehicle laws, respectively.

In Steere Dairy, Inc., 237 NLRB 1350 (1978), and Ontario Knife Co., 247 NLRB 1288 (1980), enf. denied 637 F.2d 840 (2d Cir. 1980), the statutory element of Alleluia was not present, and individual conduct was deemed to be concerted solely on the theory that it involved a matter the Board considered to be of concern to the group.

General Counsel to prove support by other employees in order to find activity concerted. With Alleluia, the Board seemed to require a respondent to submit evidence that other employees disavowed the activity to prove that it was not concerted. This is a clear shift in the burden of proof, not countenanced by either the legislative history or judicial interpretation of Section 7.[17]

The courts of appeals that have reviewed the post-Alleluia cases have rejected the per se standard of concerted activity.[18] In Krispy Kreme, the Fourth Circuit summarized the response of the courts as follows:

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[17] Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 310 (4th Cir. 1980).

[18] E.g., Ontario Knife Co. v. NLRB, 637 F.2d 840 (2d Cir. 1980); Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980); NLRB v. Dawson Cabinet Co., 566 F.2d 1079 (8th Cir. 1977).

> The Board cites no circuit decision supporting its theory of presumed "concerted activity" in this case. The only courts which have considered it have flatly rejected any rule that where the complaint of a single employee relates to an alleged violation of federal or state safety laws and there is no proof of a purpose enlisting group action in support of the complaint, there is "constructive concerted action" meeting the threshold requirement under Section 7. (635 F.2d at 309.)

For all the foregoing reasons, we are persuaded that the per se standard of concerted activity, by which the Board determines what ought to be of group concern and then artificially presumes that it is of group concern, is at odds with the Act. The Board and courts always considered, first, whether the activity is concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both "concerted" and "protected." A Board finding that a particular form of individual activity warrants group support is not a sufficient

basis for labeling that activity "concerted" within the meaning of Section 7.[19]

III. INTERBORO DISTINGUISHED FROM ALLELUIA

The Board's decision in Interboro Contractors[20] holds that actions an individual takes in attempting to enforce a provision of an existing collective-

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[19] Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942), cited by the Board in Alleluia, is not to the contrary. That case involved a strike on board a ship moored in an American port. The strike, which was found to be in violation of the Federal mutiny statutes, would otherwise have been protected by the National Labor Relations Act. The Supreme Court resolved the conflict between the Act and the mutiny statutes by instructing the Board that it could not order the reinstatement of strikers who, under the circumstances, had engaged in a criminal act. In short, the Board was required to accommodate its own mandates to those of another statutory scheme. Such accommodation, we emphasize, had the effect of narrowing the scope of the National Labor Relations Act. The "accommodation" the Alleluia decision compelled, however, involved nothing less than using other statutes to create rights that do not exist under the Act.

[20] 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

bargaining agreement are, in effect, grievances within the framework of that agreement.[21] It is not our intention to set forth the parameters of Interboro in this case, but rather to distinguish Interboro from Alleluia. The focal point in Interboro was, and must be, the attempted implementation of a collective-bargaining agreement. By contrast, in the Alleluia situation, there is no bargaining agreement, much less any attempt to enforce one, and we distinguish the two cases on that basis.

IV. DEFINITION OF CONCERTED ACTIVITY

Based on the foregoing analysis, we hold that the concept of concerted activity first enunciated in Alleluia does

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[21]The issue of the validity of the Interboro doctrine is presently pending before the Supreme Court. City Disposal Systems, 256 NLRB 451 (1981), enf. denied 683 F.2d 1005 (6th Cir. 1982), cert. granted 51 U.S.L.W. 3703 (U.S. March 28, 1983) (No. 82-960).

not comport with the principles inherent in Section 7 of the Act. We rely, instead, upon the "objective" standard of concerted activity--the standard on which the Board and courts relied before Alleluia. Accordingly, we hereby overrule Alleluia and its progeny.

Although the definition of concerted activity we set forth below is an attempt at a comprehensive one, we caution that it is by no means exhaustive. We acknowledge the myriad of factual situations that have arisen, and will continue to arise, in this area of the law. In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.[22] Once the

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[22]See Ontario Knife Co. v. NLRB, 637 F.2d 840, 845 (2d Cir. 1980); Pacific Electricord Co. v. NLRB, 361 F.2d 310 (9th Cir. 1966).

activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.[23] We emphasize that our return to a pre-Alleluia standard of concerted activity places on the General Counsel the burden

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[23]See Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in NLRB v. Transportation Management Corp., 113 LRRM 2857, 97 LC ¶ 10,164 (1983). Under this standard, an employee "may be discharged by the employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated." NLRB v. Condenser Corp. of America, 128 F.2d 67, 75 (3d Cir. 1942). Thus, absent special circumstances like NLRB v. Burnup & Sims, 379 U.S. 21 (1964), there is no violation if an employer, even mistakenly, imposes discipline in the good-faith belief that an employee engaged in misconduct.

of proving the elements of a violation as set forth herein. It will no longer be sufficient for the General Counsel to set out the subject matter that is of alleged concern to a theoretical group and expect to establish concert of action thereby. We also emphasize that, under the standard we now adopt, the question of whether an employee engaged in concerted activity is, at its heart, a factual one, the fate of a particular case rising or falling on the record evidence. It is, therefore, imperative that the parties present as full and complete a record as possible.

V. APPLICATION OF THE DEFINITION OF CONCERTED ACTIVITY TO THE FACTS OF THE INSTANT CASE

As the judge found, Charging Party Kenneth P. Prill drove trucks for a number of years and was an owner-operator for the 4 years before his employment by the Respondent. The Respondent assigned Prill to drive what was described as the "red

Ford truck" and its accompanying trailer, with which he hauled boats from the Respondent's facility in Tecumseh, Michigan, to dealers throughout the country. Prill's equipment, particularly the brakes and steering, gave him difficulty on a number of occasions, and he often lodged complaints with the Respondent concerning malfunctions.

Although the red Ford truck and trailer were assigned to Prill on what might fairly be described as a permanent basis, during the first 2 weeks of June 1979 Prill's fellow employee, Ben Gove, was assigned that equipment while Prill was absent from work. On a trip to Sudberry, Ontario, Gove experienced steering problems which nearly caused an accident. On Gove's return, he informed Supervisor Dave Faling of difficulties with the truck. Prill, who had by then returned to work, was also in Faling's

office to receive paperwork for an upcoming trip. Prill was present when Gove told Faling that he "wouldn't take the truck as far as Clinton and back, until they had done some repair on it. Until someone repaired it. I (Gove) didn't care who done it, but I wasn't going to drive it no farther."

The Respondent's mechanic, Buck Maynard, made an unsuccessful attempt to correct the problems. Thereafter, on a trip to Xenia, Ohio, during which the brakes malfunctioned, Prill voluntarily stopped at an Ohio State roadside inspection station where the trailer was cited for several defects, some relating to the brakes. Prill forwarded the citation to the Respondent's officials.

In July 1979, while driving through Tennessee, Prill was involved in an accident caused by the malfunctioning brakes. Prill telephoned the Respondent's

president, Alan Beatty, who instructed Prill to have a mechanic look at the equipment, but to get it home as best he could. The following morning Prill again called Beatty. The Respondent's vice president, Wayne Seagraves, joined the conversation on an extension telephone. Both Beatty and Seagraves were upset with Prill for not having left Tennessee, and a decision was made to send Maynard to Tennessee to examine the equipment.

Thereafter, Prill, of his own volition, contacted the Tennessee Public Service Commission to arrange for an official inspection of the vehicle. The following morning a citation was issued, and the unit was put out of service due to bad trailer brakes and damage to the hitch area of the truck. The citation mentioned several Department of Transportation regulations, including 49 C.F.R. § 396.4, which prohibits the unsafe operation of a

vehicle. A commission representative instructed Prill that certain repairs would have to be made before the vehicle could be moved.

When Maynard arrived in Tennessee, Prill showed him the citation. Maynard called Beatty, and it was decided to sell the trailer for scrap. Prill then drove the truck back to Tecumseh.

The judge found that when Prill reported in on 5 July 1979 he turned in his paperwork and was summoned to Seagraves' office. Seagraves questioned him about the accident and the damage to the truck. He asked why Prill did not chain the truck and trailer together and drive back. Prill responded that he did not believe it was safe to drive the vehicle. Seagraves then said that Prill would be terminated because "we can't have you calling the cops like this all the time." Beatty, who had entered the office during

the conversation, also asked why Prill did not chain the truck and trailer. Prill responded that it would have been unsafe and unlawful in view of the citation.

The judge concluded that Prill was discharged for two reasons: (1) his refusal to drive an unsafe vehicle after filing the report with the Tennessee Public Service Commission, and (2) his earlier safety complaints, including a complaint to Ohio authorities. The judge held that Prill's discharge was unlawful, relying on Alleluia, which he noted, "established a presumption that an individual employee engages in concerted activity where his conduct arises out of the employment relationship and is a matter of common concern among all employees." (Decision of the administrative law judge, sec. II, B, par. 2.)[24]

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[24]The judge additionally relied on Ontario Knife Co., 247 NLRB 1288 (1980), (continued...)

The judge further noted in support of his Alleluia analysis that Prill's refusal to drive the equipment was mandated by Department of Transportation regulations, which require that an inspection be made after an accident to determine the extent of damage, and also that a vehicle cited as unsafe not be operated until it is repaired.[25]

The judge found that Prill, by contacting local authorities and refusing to drive the vehicle, was enforcing the cited provisions of the national transportation policy, and that his invoking the Tennessee Public Service Commission's inspection apparatus was the legal equivalent of a safety complaint to OSHA.

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[24](...continued)
enf. denied 637 F.2d 840 (2d Cir.); Steere Dairy, 237 NLRB 1350 (1978); and Pink Moody, Inc., 237 NLRB 39 (1978).

[25]Citing Federal Motor Carrier Safety Regulations, 49 C.F.R. § 396.4.

See Alleluia. The judge concluded his analysis by stating that Respondent was "free, under Alleluia Cushion, to rebut the inference that Prill's activity inured to the benefit of all employees. It could have been shown, for example, that Prill's protests and complaints were not made in good faith or were simply the idiosyncrasies of a super sensitive individual whose concerns could not have been shared by other truckdrivers in similar circumstances. This Respondent failed utterly to accomplish." (Decision of the administrative law judge, sec. II,B, par. 10.)

Rejecting, as we do, the judge's reliance on Alleluia we find that the Respondent did not violate Section 8(a)(1) of the Act when it discharged Prill for refusing to drive his truck and trailer and for contacting state authorities. Prill alone refused to drive the truck and

trailer; he alone contacted the Tennessee Public Service Commission after the accident; and, prior to the accident, he alone contacted the Ohio authorities. Prill acted solely on his own behalf. It follows that, without the artificial presumption Alleluia created, the facts of this case do not support a finding that Prill engaged in concerted activity.

There is one other point that warrants consideration. The judge stated that "Prill's complaints about the trailer brakes prior to the accident were clearly concerted since they were joined by driver Gove who made similar complaints, in Prill's presence, to management officials about the safety of Prill's vehicle when he, Gove, was assigned to drive it for 2 weeks." (Decision of the administrative law judge, sec. II,B, par. 8.) It is not certain whether the judge cited this evidence in support of his Alleluia

analysis, or in support of an alternative pre-Alleluia rationale. To the extent that the judge appears to have concluded that this record evidence would lead to a finding of concerted action under a pre-Alleluia analysis, we reject his conclusion.

The record is clear that Prill merely overheard Gove's complaint while in the office on another matter, and there is no evidence that anything else occurred. The record reflects, and the judge found, only that Prill stood by when Gove made his complaint; the judge correctly made no factual finding that Prill and Gove in any way joined forces to protest the truck's condition. Indeed, the most that can be inferred from this scenario is that another employee was individually concerned, and individually complained, about the truck's condition. Taken by itself, however, individual employee concern, even

if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action.

In this regard, the Alleluia presumption has only engendered analytical confusion. Thus, under Alleluia, concern is presumed unless otherwise rebutted; to affirmatively show that another employee is individually concerned, or even lodges a complaint, adds not one whit to an Alleluia analysis. Yet, evidence of individual concern by more than one employee has come to be viewed as evidence of concert itself, and has so blurred the distinction between the two types of evidence that the Board has lost sight of what is required of a pre-Alleluia analysis.

In its pre-Alleluia days the Board had, in fact, considered factual patterns similar to that presented herein and had declined to find concerted activity. See,

e.g., Traylor-Pamco and Continental Mfg., discussed supra. As with the employees who ate their lunch together in Traylor-Pamco, there is no evidence here that there was any concerted plan of action between Gove and Prill, or that either relied in any measure on the other when each refused to drive the truck. In addition, as in Continental Mfg., there is no support for a finding that either Gove's or Prill's refusal was intended to enlist the support of other employees. Prill's refusal to drive the truck and trailer and his report to the Tennessee Public Service Commission were made by himself and for himself alone, and thus cannot be deemed concerted.

One might nonetheless fairly argue that Prill's situation is a sympathetic one that should cause us concern. We do not believe, however, that Section 7, framed as it was to legitimize and protect

group action engaged in by employees for their mutual aid or protection, was intended to encompass the case of individual activity presented here. Although it might be argued that a solitary over-the-road truckdriver would be hard pressed to enlist the support of coworkers while away from the home terminal, the Board, to paraphrase former Chairman Edward Miller's dissent in G.V.R., is neither God nor the Department of Transportation. Outraged though we may be by a respondent who--at the expense of its driver and others traveling on the nation's highways--was clearly attempting to squeeze the last drop of life out of a trailer that had just as clearly given up the ghost, we are not empowered to correct all immorality or even illegality arising under the total fabric of Federal and state laws.

In conclusion, we acknowledge that

there are few areas of the law that are entirely free of uncertainty or disagreement. We are persuaded, however, that Alleluia and its progeny have been an unfortunate deviation from the objectives and purposes of the Act, as defined by its legislative and judicial history, and it will not serve us well, nor those whom we are charged to protect, to continue to adhere to Alleluia's precepts.

Accordingly, based on all the foregoing reasons, and the record as a whole, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, dissenting:

My colleagues today reject the theory of implied concerted activity developed in Alleluia Cushion Co., 221 NLRB 999 (1975). Their ruling allows Respondent to lawfully discharge employee Prill for filing a complaint with the

Tennessee Public Service Commission (Tennessee Commission) after having an accident due to faulty brakes. My colleagues admit there may be something outrageous about an employer who is willing to endanger its employees by attempting to force the use of a trailer which had "clearly given up the ghost." They also concede that a solitary over-the-road truckdriver would be hard pressed to enlist the support of coworkers while away from the home terminal. Nevertheless, they find this employee unprotected by the Act because no other employee expressly joined him in lodging the complaint with the Tennessee Commission.

My colleagues report today that the Board is not God. If only their expectation of employees covered by this Act were equally humble. Protection for such employees, they now announce, will be

withheld entirely if in trying to insure reasonably safe working conditions they happen not to be so omniscient as to rally other employees to their aid in advance. No matter that the conditions complained of are highly hazardous, or that they are a potential peril to other employees, or that they are the subject of government safety regulation. This is a distortion of the rights guaranteed employees by the Act. The historical roots of "concerted activity" lie in the movement to shield organized labor from the criminal conspiracy laws and the injunctive power of the courts. It goes against the history and spirit of Federal labor laws to use the concept of concerted activity to cut off protection for the individual employee who asserts collective rights. It is my colleagues who use mirrors on Section 7 and not the Board which decided Alleluia Cushion Co.

I. THE ALLELUIA, DECISION IS BASED ON TWO RATIONALES

Alleluia involved the discharge of an employee for filing a complaint with the California office of the Occupational Safety and Health Administration (OSHA). It was undisputed that the employee acted alone in protesting the lack of safety precautions. The Board nevertheless found this individual action to be concerted and protected by the Act on the ground that it must be presumed that other employees shared the interest in safety and supported the single employee's complaint. The Board's decision contains two rationales for the presumption of concerted action. First, reference is made to safe working conditions as "matters of great and continuing concern for all within the workforce"[1] and occupational safety is identified as "one of the most important

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[1] 221 NLRB at 1000.

conditions of employment."[2] In addition, the Board emphasized that the nature and extent of the employee's complaints demonstrated that while the employee was concerned for his individual safety, his object also encompassed the well-being of his fellow employees. Second, the Board pointed to the public policy enunciated in the Occupational Safety and Health Act and made the following analysis:

> [S]ince minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed

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[2]Id.

for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.[3]

The two rationales are discrete: the first presumes concert from the presence of a matter of "great and continuing concern" to the work force and requires an analysis of the specific complaint to determine whether it goes beyond individual concerns; the second presumes concert from the legislative declaration of public interest in a matter relating to the workplace and requires the assertion of a statutory right. Neither rationale was articulated with precision. Though these two approaches are different, the Alleluia decision intertwined them, treating them as one. This mixture of

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[3]Id.

rationales undoubtedly created conditions for court opposition to the concept of concerted activity in Alleluia. Criticism of the opinion is therefore understandable. But that alone is not sufficient ground for rejecting the principles established in the decision.

The case before us involves only one of the principles embodied in Alleluia--that an employee's assertion of an employment-related statutory right can be presumed to be activity covered by the NLRA. As such it requires no consideration of general arguments concerning a presumption of concert in the assertion of a matter of common concern to the work force.

I would find in this case, as did the Board in Alleluia, that the presumption of concert in the assertion of an employment-related statutory right is proper and valid. This position is based

on the Board's recognized authority to apply presumptions and on the finding that the presumption of concerted activity in the individual assertion of a statutory right concerning the workplace is consistent with the legislative history of Section 7 of the Act, is supported by the policies of the Act, and fulfills the Board's responsibility to accommodate the Act to other employment legislation.

II. THE POLICIES OF THE ACT AND THE HISTORICAL USE OF THE TERM "CONCERT" INDICATE THAT SECTION 7 PROTECTS THE INDIVIDUAL ASSERTION OF A WORK-RELATED STATUTORY RIGHT

The central purpose of the Act is to avoid or minimize industrial strife which interferes with the normal flow of commerce. Section 1(b) of the Labor Management Relations Act (29 U.S.C. 141(b)) asserts that this purpose can be achieved if employers, employees, and labor organizations "each recognize under law one another's legitimate rights in their

relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest." Section 1 of the Act further declares that it is "the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce ... by protecting the exercise by workers of full freedom of association ... for the purpose of ... mutual aid or protection." Section 7 of the Act then sets forth the boundaries of employees' protected rights, establishing the right "to engage in other concerted activities for the purpose of ... mutual aid or protection."

There is no question that the assertion of a work-related statutory right by two or more employees falls within the above-described policies and

protections of the Act. It involves association for the purpose of mutual aid or protection and opposes an act or practice by the employer which may jeopardize public health, safety, or interest. However, an individual employee's assertion of such a statutory right raises a question concerning the applicability of the Act because it is not taken in physical and simultaneous concert with at least one other employee and the language of Section 7 specifically mentions "concerted activity."

Opposing courts have taken the view that "concerted" means literal group action. The legislative history of the Act neither supports nor refutes this interpretation. It is virtually silent as to the precise meaning and applicability of "concerted activities." But the likely explanation for this silence is that, in view of the history leading up to enact-

ment of Section 7, there existed, at the time of enactment, no need for precise definition of the term.

A. The Earliest Use of the term Concerted was in Opposition to the Application of the Doctrine of Criminal Conspiracy to Employees' Organizing Efforts

The earliest attempts of American labor to organize in order to improve working conditions were met by judicial application of the doctrine of criminal conspiracy as established in England in the 18th century.[4] That doctrine permitted individual conduct, but proscribed the same conduct by two or more persons acting together:

> As in the case of journeymen conspiring to raise their wages; each may insist on raising his wages if he

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[4]See generally Russell A. Smith, Leroy S. Merrifield, and Theodore J. St. Antoine, Labor Relations Law (4th ed. 1968) at 1-54 and Robert A. Gorman and Matthew W. Finkin, The Individual and the Requirement of "Concert" under the National Labor Relations Act, 130 U.Pa.L.Rev. 286.

can; but if several meet for the same purpose, it is illegal and the parties may be indicted for a conspiracy. Rex. v. Mawbey, 6 T.R. 619, 636 (1796).

In a 19th century case, Justice Holmes noted the anomaly which allowed individual action but found criminal the same action taken collectively by a group. He took issue with the conspiracy doctrine in a dissenting opinion in Vegelahn v. Gunter:[5]

> But there is a notion which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle.

Despite use of the conspiracy doctrine and the attendant labor injunction, the movement toward organized labor continued and eventually made an impact on

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[5]167 Mass. 92, 44 N.E. 1077 (1896).

the legislative process. Some of the earliest labor legislation was directed toward insulating organized labor from the criminal conspiracy doctrine and the injunctive power of the courts. It is in this context that the term "concert" first appeared. The Clayton Act of 1914 provided that "no ... injunction shall prohibit any person or persons, whether singly or in concert, from ... ceasing to perform any work or labor ...."[6] The term appeared again in the Norris-LaGuardia Act both in a clause prohibiting injunctions[7] and in a clause which is similar to the language used in Section 7 of the Act: "it is necessary that (the individual unorganized worker) shall be free from the interference, restraint or coercion of

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[6]38 Stat. 738 (1914), 29 U.S.C. s 51 (1946).

[7]47 Stat. 70 (1932), 29 U.S.C. s 104 (1946).

employers ... in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...."[8] Identical language was used in Section 7(a) of the National Industrial Recovery Act,[9] and subsequently in Section 7 of the NLRA, providing that "concerted activities for the purpose of collective bargaining or other mutual aid or protection" shall not be interfered with. It thus appears that the concept of concerted activities which first emerged in the Clayton Act of 1914 as a check against the use of the criminal conspiracy doctrine was picked up, without comment, in subsequent labor legislation.

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[8]47 Stat. 70 (1932), 29 U.S.C. s 102 (1942).

[9]48 Stat. 198 (1938).

B. "Concerted Activities" May Reasonably be Construed as Supplementing an Individual Employee's Rights

Given this history, it is reasonable to construe the term "concerted" in the Act as expanding preexisting employee rights concerning the workplace, assuring that acts lawfully undertaken by an individual could not be deemed unlawful when undertaken as a group. While the Act focuses on collective action, there is no indication that the term applies only to literal collective action or was intended by Congress to limit the assertion of employee rights.[10] Rather, the term appears to limit only the assertion of individual rights which have no relationship to any collective effort to improve working conditions or to extend aid or

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[10]Congressman Bolard's remarks, cited by the majority, provide no such indication, as they merely focus on the expansion of rights.

protection to fellow workers.

C. The Assertion of a Work-Related Statutory Right Falls Within the Meaning of "Concerted Activity"

A work-related statutory right is not in essence an individual right; instead, it is a right shared by and created for employees as a group through the legislative process at the Federal or state level. In such a case, the legislature determines that maintenance or establishment of a particular condition of employment is in the public interest. The statute is addressed to the needs of employees as a class or strata within the society at large. When viewed against the historical background of the Act, an individual employee's assertion of this type of statutory right is fully consistent with the literal group action of employees requesting higher wages for all. In both instances, the action concerns employees as a group constituting an

opposing force to the economic power of employers, the very type of action that the earliest uses of the term "concerted" were designed to protect.

III. THE SUPREME COURT HAS LONG ACKNOWLEDGED THE BOARD'S AUTHORITY TO USE PRESUMPTIONS IN ADMINISTERING THE ACT

The Alleluia decision makes the presumption that the individual assertion of an employment-related statutory right is a concerted act. The creation of presumptions by the Board based on the realities of the workplace is not a unique phenomenon. In 1945 the Supreme Court approved the Board's use of such a presumption in Republic Aviation Corp.[11] That case involved the presumption that a rule prohibiting union solicitation by employees outside of working hours is an unreasonable impediment to self-organiza-

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[11] Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

tion and hence unlawful. In rejecting the attack on the Board's use of this presumption, the Court stated:

> An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which led to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. (Citations omitted.)[12]

The Court found no error in the

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[12]Id. at 800.

Board's adoption of the presumption, noting that it was "the product of the Board's appraisal of normal conditions about industrial establishments. Like a statutory presumption or one established by regulation, the validity, perhaps in a varying degree, depends upon the rationality between what is proved and what is inferred."[13]

Here, it is undisputed, and therefore proven, that a right concerning the workplace has been established by a legislature and an individual has suffered adverse consequences from asserting that right. Unlike my colleagues, I would infer that the assertion of the right is, at its core, a concerted act. Thus, a matter concerning conditions of employment which legislatively has been deemed in the public interest may certainly be presumed

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[13]Id. at 804-805.

a matter of concern to all the employees for whom the statute has been enacted.[14] For the reasons set forth in section II, this inference of concert is one rationally drawn from the proven facts and is, therefore, valid under the standards of Republic Aviation Corp.

IV. THE INFERENCE OF CONCERT IN THE INDIVIDUAL ASSERTION OF A WORK-RELATED STATUTORY RIGHT IS SUPPORTED BY THE ACT'S POLICIES AND THE BOARD'S MANDATE TO ACCOMMODATE OTHER EMPLOYMENT LEGISLATION

As shown above, there is a rational connection between the assertion of a statutory right governing the workplace and the inference that all employees whose rights are protected by the statute support the individual assertion of those

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[14] See, e.g., Bethlehem Shipbuilding Corp. v. NLRB, 114 F.2d 930, 937 (1st Cir.1940), petition for cert. dismissed on motion of petitioner 312 U.S. 710 (1941) (involving unlawful interference with employee efforts to secure favorable workmen's compensation legislation).

rights. Not only is this presumption of concerted action supported by the historical use of the term "concerted," but also by the Act's policies and by the Board's mandate to administer the Act in accommodation with other employment legislation.

The Act specifically states that the purpose of avoiding and minimizing industrial strife can be achieved if employers, employees, and labor organizations "above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest."[15] The Act therefore contemplates a concern by employees for matters affecting the public health, safety, or interest. Further, the Board has been admonished to recognize the

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[15]29 U.S.C. 141(b).

purposes of other employment legislation and to construe the Act in a mannersupportive of the overall statutory scheme. The Supreme Court stated in Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942):

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so singlemindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Given these policies and admonitions, it is reasonable to presume that when an individual employee invokes a statute governing a condition in the workplace he is within the scope of employee action contemplated by the Act (i.e., a challenge to an employer's practice concerning the public health, safety, or interest). Further, it would be incongruous with the public policy embedded in employment-

related legislation--and indeed inconsistent with the very act of passage--to assume that, in the absence of an express manifestation of support, other employees do not collectively share an interest in an attempted vindication of the statutory right created for their benefit. Presuming concert in the individual assertion of an employment-related statutory right running to all employees, therefore, accommodates the Act to the overall legislative policy regarding the workplace and working conditions.

CONCLUSION

For all the reasons set forth above, it is appropriate to presume that the individual assertion of an employment-related statutory right is concerted. Making this presumption does not end the matter; it merely shifts the burden to the employer to show that, in a particular case, the employees, for whatever reasons,

opposed the individual's assertion of that interest or that the individual specifically acted in his own interest.[16] The presumption is no less valid, and the employer's burden no heavier, than in cases involving, as did Republic Aviation, solicitation rules.

Considering the facts of this case, as found by the judge, I conclude that Prill was discharged in violation of Section 8(a)(1). The judge found that Prill was discharged because of his complaints about the safety of equipment he was required to drive, including a complaint to the Tennessee Commission following an accident, and because of his refusal, for safety reasons, to drive the equipment following the accident. By

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[16]See Comet Fast Freight, 262 NLRB 430 (1982), for an example of such a demonstration that the individual did not act in the interest of his fellow employees.

reporting to the Tennessee Commission, Prill invoked laws regulating motor carriers, and initiated an investigation which resulted in issuance of a citation by the Tennessee Commission based on Department of Transportation regulations. I would find that in resorting to this legislation Prill engaged in concerted activity. Although the Department of Transportation regulations concern the safety of public highways generally, they also regulate, among other things, the safety of equipment that drivers for motor carriers are required to operate and the obligations of drivers in case of accidents. Since the highways they regulate are the workplace of commercial drivers, they, in effect, concern conditions of employment for such drivers of motor carriers. In these circumstances, it is appropriate to presume that other drivers support the assertion of those regula-

tions.

The presumption is validated by the record. Employee Gove drove Prill's regularly assigned truck and trailer for a 2-week period while Prill was absent. Prill was present when Gove reported problems with the steering and told Supervisor Faling that he would not drive the truck until someone repaired it. It is, therefore, indisputable that two employees were concerned with the safety of the truck and trailer and tried to do something about it. It is certainly valid to presume, at the very least, that Gove supported Prill's complaint to the Tennessee Commission. Yet my colleagues allow Prill's fate to be dictated by such happenstance as the failure to make a phone call. If, after the accident in Tennessee, Prill had phoned Gove, discussed the problem, and received his likely approval to contact the Tennessee

Commission, his action would have been concerted and he would be working today. Because he failed to make such a call, and instead individually invoked regulations designed to protect commercial drivers as a group and others using the highways, his case is dismissed. Surely the concerted activity provision in Section 7 was not intended to produce such anomalous results when the safety of employees' working conditions is at issue. My colleagues' concern with the need to draw a line in this area is, like the criticism of Alleluia, understandable. But, wherever the line should be drawn it assuredly should not be drawn at such a point where it creates a safe zone for employers to retaliate against employees who protest over matters which strike at the heart of the economic relationship between employer and employee. To do so runs against one of the central aims of the National Labor

Relations Act: to guarantee that employees do not lose their jobs because they challenge an employer on a matter concerning group wages, hours, or terms and conditions of employment. The use of the term "concerted" in this arena merely insures that collective action cannot be subject to charges of criminal conspiracy and that the Act's protection extends only to matters addressed to employees as a class or group. I dissent from my colleagues' use of the term to distort the fundamental principles of the statute they are charged to enforce.

Dated, Washington, D.C. 6 January 1984

Don A. Zimmerman, Member

UNITED STATES OF AMERICA
BEFORE THE U.S. COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

MEYERS INDUSTRIES, INC.

and

KENNETH P. PRILL, an Individual

Case 84-1064

Dated, Washington, D.C. 26 February 1985

Before WALD, EDWARDS, and BORK, Circuit Judges.

Full Text of Opinion

EDWARDS: Circuit Judge: -

I. PROLOGUE

On this petition for review, we consider a case in which the petitioner, Kenneth Prill, was discharged from his job at Meyers Industries, Inc. ("Meyers"), because he complained about the unsafe condition of a company truck and trailer, including a complaint to state authorities following an accident, and because he refused, for safety reasons, to continue driving the truck and trailer following the accident. An investigation by state

officials determined that the company vehicle was in fact unsafe due to faulty brakes and a damaged hitch, and a citation was issued against Meyers. Notwithstanding the concededly unsafe condition of the vehicle, Prill was fired because company officials decided that they could not have him "calling the cops all the time."

In protest against his discharge, Prill filed an unfair labor practice charge with the National Labor Relations Board ("NLRB" or "Board"), and a complaint was issued against Meyers. An Administrative Law Judge ("ALJ"), following existing Board precedent, found that Prill's conduct constituted "concerted activit[y] for ... mutual aid or protection" under section 7 of the National Labor Relations Act ("NLRA" or "Act"),[1] and recommended

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[1] §7, 29 U.S.C. §157 (1982) provides:
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain
(continued...)

his full reinstatement. However, the Board, over the dissent of one member, reversed the decision of the ALJ, overruled its earlier decisions, and dismissed the complaint against Meyers.[2] In rejecting Prill's charge, the Board adopted a new definition of "concerted activities;" under the enunciated test, an employee's

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[1](...continued)
collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1) (1982), provides:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

[2]Meyers Indus., Inc., 268 N.L.R.B. No. 73, 115 L.R.R.M. 1025 (Jan. 6, 1984) (hereinafter referred to as "Meyers").

conduct is not "concerted" unless it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[3] Finding that Prill had acted alone and "solely on his own behalf,"[4] the Board held his conduct unprotected by section 7.

[1] It is not the responsibility of the courts to second-guess the lawful judgments of the NLRB. The Board has been granted broad authority to construe the NLRA in light of its expertise. In appropriate circumstances, the Board even may elect to abandon or modify established precedent. However, judicial deference is not accorded a decision of the NLRB when the Board acts pursuant to an erroneous view of law and, as a consequence, fails to exercise the discretion delegated to it

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[3] Id. at 12, 115 L.R.R.M. at 1029.

[4] Id. at 16, 115 L.R.R.M. at 1030.

by Congress.

In the instant case, we find that the Board erred when it decided that its new definition of "concerted activities" was mandated by the NLRA. Because the Board misconstrued the bounds of the law, its opinion stands on a faulty legal premise and without adequate rationale. Accordingly, we remand this case under the principles of SEC v. Chenery Corp.,[5] so that the Board may reconsider the scope of "concerted activities" under section 7. We express no opinion as to the correct test of "concerted activities;" we require only that the Board exercise the full measure of administrative discretion granted to it by Congress and reconsider this matter free from its erroneous conception of the bounds of the law.

II. BACKGROUND

[5]318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943).

A. Facts

The facts were found by the Administrative Law Judge[6] and accepted by the Board,[7] and are largely undisputed on review. Kenneth Prill was hired as a skilled driver on April 24, 1979, by Meyers Industries, a Michigan company engaged in the manufacture, sale and distribution of aluminum boats and related products. Prill had driven trucks for several years before going to work for Meyers, and he had received two years of training as a mechanic. Throughout the period that he was employed by Meyers, he had a good work record.

Prill was assigned to drive a red

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[6] Meyers Indus., Inc., Case 7-CA-17207, slip op. at 2-5 (Jan. 14, 1981), reprinted in Joint Appendix ("J.A.") 280, 281-84 (hereinafter referred to as "ALJ Decision").

[7] Meyers at 1-2, 13-15, 115 L.R.R.M. at 1029-30.

Ford truck and its accompanying trailer to haul boats from Meyers' main facility in Tecumseh, Michigan, to dealers throughout the country. Prill soon began to experience problems with his equipment, especially with the steering and the trailer's brakes.[8] In addition to discussing these problems with other drivers,[9] Prill made numerous complaints to his supervisor, Dave Faling, to the company president, Alan Beatty, and to the mechanic, Buck Maynard, after returning from trips on which the brakes malfunc-

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[8]As Prill explained in his testimony before the ALJ, his vehicle was equipped with braking systems on both the truck and the trailer components. These systems, although they can be operated independently, ordinarily would function together when the brake pedal is depressed. On the vehicle assigned to Prill, however, the brakes on the trailer were essentially inoperative. See Transcript of Hearing (Aug. 1, 1980) ("Tr.") at 16-17, J.A. 40-41.

[9]See Tr. at 18, J.A. 42.

tioned.

On one trip, for example, while he was driving through Chicago, Illinois, Prill narrowly escaped an accident when his brakes failed during a sudden stop in heavy traffic. On his return Prill asked Faling and Maynard to have the brakes repaired, but Maynard's efforts were unsuccessful. He told Prill that the axles were so old that it was impossible to secure replacement parts; Prill insisted that new parts be purchased. After his next trip, during which the brakes remained inoperative, Prill again asked Faling when the brakes would be repaired, but was simply referred to Maynard or Beatty.

On a subsequent trip to Xenia, Ohio, Prill stopped at a roadside inspection conducted by the Ohio State Highway Patrol. As a result of that inspection, the truck was issued a citation for a

number of defects, including the brakes. When Prill returned to Michigan, he showed the citation to Faling and submitted it together with his post-trip paperwork.

During the first two weeks in June, 1979, another driver, Ben Gove, drove Prill's equipment on a trip to Sudberry, Ontario. Gove testified before the ALJ that he experienced a steering problem which made it difficult to hold the road and "caused [the truck] to swerve back and forth like Ken Prill described," nearly causing an accident.[10] When Gove went to Faling's office to submit his post-trip report, Prill was there at the same time to receive paperwork for the next trip. Gove described the steering and brake problems to Faling, and stated, in Prill's presence, that he would not drive the

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[10] Tr. at 62, J.A. 86.

truck again until it was repaired.[11] Faling promised to make the needed repairs.

In early July, Prill was driving through Athens, Tennessee, when he had an accident which the Board found was caused by the malfunctioning brakes.[12] A pickup truck struck the left rear of Prill's trailer, causing the truck to jack-knife and sending both vehicles into a ditch.[13]

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[11]Gove testified at the hearing that he told Faling, "I wouldn't take the truck as far as Clinton and back, until ... someone reapired [sic] it. I didn't care who done it, but I wasn't going to drive it no further." Tr. at 63, J.A. 87. In its brief, the Board reads this statement to mean that Gove did not care who drove the truck. Brief for NLRB at 3. We agree with the petitioner, Reply Brief of Petitioner at 1-2, that the more natural reading of Gove's statement is that he did not care who repaired the truck so long as repairs were made.

[12]Meyers at 14, 115 L.R.R.M. at 1029.

[13]Meyers conceded before the agency that the accident was not Prill's fault and that it was not a consideration in his

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After giving a statement to the state highway patrol at the scene of the accident, Prill unsuccessfully sought to have the truck and trailer inspected by the state public service commission.[14]

Following the accident, Prill called Meyers' president Alan Beatty at home to advise him of the incident and of the extensive damage to the unit. Beatty asked Prill to chain the tractor and trailer together and tow the trailer back to Tecumseh for repairs. Prill responded that "it would be possible to do that, but it would still be a hazard on the highway" because the hitch area was cracked and might give way and cause an accident.[15] Beatty repeated that Prill should chain

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[13](...continued)
discharge. ALJ Decision at 3, J.A. 282.

[14]Tr. at 34-35, J.A. 58-59.

[15]Tr. at 36, J.A. 60.

and tow the trailer home, but told him that if he insisted he could have a mechanic in Tennessee look at it.

The following morning, Prill called Beatty at work and spoke to him and to Wayne Seagraves, the company's vice president for production. Both were upset that Prill was still in Tennessee, and demanded to know why he had not yet left. Prill stated that the vehicle was unsafe because the hitch was damaged and the trailer lacked brakes. Seagraves responded that the company had been running its trucks like that for 20 years.[16] At the end of the conversation, Beatty and Seagraves decided to send Maynard down to check the equipment.

After this conversation, Prill decided to contact the Tennessee Public Service Commission to arrange for an official inspection of the vehicle. The

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[16]Tr. at 37, J.A. 61.

inspection resulted in a citation putting the unit out of service because of bad brakes and damage to the hitch area. The citation was based on several Department of Transportation regulations, including 49 C.F.R. §396.4, which prohibited the operation of an unsafe vehicle.[17] Prill

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[17] 49 C.F.R. §396.4 (1978), the regulation in effect at the time of the events herein, provided as follows:

> **Unsafe operations forbidden.**
> No motor carrier shall permit or require a driver to drive any motor vehicle revealed by inspection or operation to be in such condition that its operation would be hazardous or likely to result in a breakdown of the vehicle nor shall any driver drive any motor vehicle which by reason of its mechanical condition is so imminently hazardous to operate as to be likely to cause an accident or a breakdown of the vehicle. If while any motor vehicle is being operated on a highway, it is discovered to be in such unsafe condition, it shall be continued in operation only to the nearest place where repairs can safely be effected, and even such operations shall be conducted only if it be less hazardous to the public than permitting the
> (continued...)

was instructed to notify the police or Public Service Commission immediately if anyone attempted to move the vehicle before required repairs were made. When Maynard arrived in Tennessee later the same day, Prill showed him the citation. Maynard and Beatty then decided that the trailer was not worth repairing and should be sold for scrap after removing the tires.

Two days later Prill reported for work and was summoned to Wayne Seagraves' office, where he was questioned about the accident and damage to the truck. Both Seagraves and Beatty asked Prill why he had not towed the trailer back as requested; Prill responded that this would

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[17](...continued)
vehicle to remain on the highway.

have been both unsafe and unlawful.[18] At the end of the conversation, Seagraves told Prill that he was discharged because "we can't have you calling the cops like

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[18] Prill testified that he told Seagraves "that the law requires that all vehicles that are involved in an accident be inspected by either a state authority or a certified mechanic of somekind [sic] before they are moved or put back on the highway again." Tr. at 54, J.A. 78. Prill testified that in this conversation he was relying on §396.6 of the Federal Motor Carrier Safety Regulations, which were contained in a manual for truck drivers published by the Federal Highway Administration, U.S. Department of Transportation. The section provided as follows:

> **Damaged vehicles, inspection.**
> No motor carrier shall permit or require a driver to drive nor shall any driver drive a motor vehicle which has been damaged in an accident or by other cause until inspection has been made by a person qualified to ascertain the nature and extent of the damage and the relationship of such damage to the safe operation of the motor vehicle, nor shall such motor vehicle be operated until such person has determined it to be in safe operating condition.

49 C.F.R. §396.6 (1978).

this all the time."[19]

B. The Decisions of the ALJ and the Board

On the basis of these facts, the ALJ found that Prill was discharged because of his safety complaints and his refusal to drive an unsafe vehicle in accordance with Department of Transportation regulations.[20] Relying on the rationale of Alleluia Cushion Co.,[21] the ALJ held that Prill's actions were "concerted activities for ... mutual aid or protection" under section 7 of the NLRA, and thus protected, because they inured to the benefit of all employees.[22] In order to understand this conclusion, it is necessary briefly to review the development of the Board's

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[19]Tr. at 44, J.A. 68.

[20]ALJ Decision at 8-9, J.A. 287-88.

[21]221 N.L.R.B. 999 (1975).

[22]ALJ Decision at 9-10, J.A. 288-90.

doctrine of "constructive concerted activity."

During the past 25 years, the Board has gradually extended the concept of "concerted activities" under section 7 to include certain types of actions taken by individual employees. For example, under the so-called Interboro doctrine, the Board has long held that the assertion by a single employee of rights derived from a collective bargaining agreement is protected under section 7, on the reasoning that such an act is an extension of the concerted action that produced the agreement and that it affects the rights of all employees covered by the agreement.[23] In addition, in a series of cases since 1959, the Board developed the

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[23]See Interboro Contractors, Inc., 157 N.L.R.B. 1295, 1298 (1966), enforced, 388 F.2d 495 (2d Cir. 1967); Bunney Bros. Constr. Co., 139 N.L.R.B. 1516, 1519 (1962).

position that section 7 protects complaints made by an individual, even absent authorization by other employees, "if the matter at issue is of moment to the group of employees complaining and if that matter is brought to the attention of management by a spokesman, voluntary or appointed for that purpose, so long as such person is speaking for the benefit of the interested group."[24]

In Alleluia Cushion Co.,[25] the Board extended the doctrine of constructive concerted activity to include an individual employee's efforts to invoke state and federal laws regulating occupational safety. In Alleluia an employee was

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[24]Carbet Corp., 191 N.L.R.B. 892, 892 (1971); Hugh H. Wilson Corp., 171 N.L.R.B. 1040, 1046 (1968), enforced, 414 F.2d 1345 (3d Cir. 1969), cert. denied, 397 U.S. 935, 90 S.Ct. 943, 25 L.Ed.2d 115 (1970); Guernsey-Muskingum Elec. Coop., Inc., 124 N.L.R.B. 618, 624 (1959), enforced, 285 F.2d 8 (6th Cir. 1960).

[25]221 N.L.R.B. 999 (1975).

discharged for notifying the California Occupational Safety and Health Administration (OSHA) of unsafe conditions at his plant. Observing that "[s]afe working conditions are matters of great and continuing concern for all within the workforce," and that filing the OSHA complaint "was an action taken in furtherance of guaranteeing Respondent's employees their rights under the California Occupational Safety and Health Act," the Board held that

> [i]t would be incongruous with the public policy enunciated in such occupational safety legislation ... to presume that, absent an outward manifestation of support, Henley's fellow employees did not agree with his efforts to secure compliance with the statutory obligations imposed on Respondent for their benefit. Rather, since minimum safe and healthful employment conditions for the protection and well-being of employees has been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational

safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.[26]

The rationale of Alleluia thus was composed of two stands: (1) the Board's familiar view that an individual's activity should be protected if it relates to a matter of "mutual concern" to employees, and (2) a more specific rationale that concert may be presumed when an individual asserts rights under a statute enacted for the benefit of employees.[27]

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[26] Id. at 1000.

[27] See Meyers at 20-21, 15 L.R.R.M. at 1031-32 (Member Zimmerman, dissenting); Gorman & Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U.Pa.L.Rev. 286, 305 (1981).

In later cases, the Board extended the reasoning of Alleluia to protect the assertion of rights under other statutes, as well as to complaints over matters of mutual concern and to employee complaints made to the employer rather than to governmental agencies. See, e.g., Krispy

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Applying the principles of Alleluia and its progeny,[28] the ALJ in the instant

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[27](...continued)
Kreme Doughnut Corp., 245 N.L.R.B. 1053 (1979), enforcement denied, 635 F.2d 304 (4th Cir. 1980) (worker's compensation claim); Steere Dairy, Inc., 237 N.L.R.B. 1350 (1978) (protest over pay and working conditions); Self Cycle & Marine Distrib. Co., 237 N.L.R.B. 75 (1978) (unemployment compensation claim); Air Surrey Corp., 229 N.L.R.B. 1064 (1977), enforcement denied, 601 F.2d 256 (6th Cir. 1979) (inquiry concerning employer's ability to meet payroll); Dawson Cabinet Co., 228 N.L.R.B. 290, enforcement denied, 566 F.2d 1079 (8th Cir. 1977) (protest over failure to comply with Equal Pay Act).

While the Alleluia decision itself did not receive judicial review, the post-Alleluia decisions were generally rejected by the courts of appeals. See, e.g., Ontario Knife Co. v. NLRB, 637 F.2d 840 (2d Cir. 1980); Krispy Kreme, supra; Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980); NLRB v. Bighorn Beverage, 614 F.2d 1238 (9th Cir. 1980); Dawson Cabinet Co., supra. But see, e.g., NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442 (6th Cir. 1981); NLRB v. Ambulance Serv. of New Bedford, Inc., 564 F.2d 88 (1st Cir.), enforcing mem. 229 N.L.R.B. 106 (1977); see also NLRB v. Parr Lance Ambulance Serv., 723 F.2d 575, 579-80 (7th Cir. 1983). We discuss below, see note 72 infra, the relevance of these decisions to the instant case.

[28]In particular, the ALJ relied on Pink Moody, Inc., 237 N.L.R.B. 39 (1978), (continued...)

case held Prill's conduct protected under section 7. He reasoned that Prill's refusal to drive the vehicle was mandated by Department of Transportation regulations that reflected a concern for the safety of particular drivers as well as for that of the general public, and that "[a]n employee who complains about the safety of a particular truck speaks for the safety of any employee who may drive that truck."[29] The ALJ also held that Prill's complaints prior to the accident "were clearly concerted because they were joined by driver Gove," who had made similar complaints to supervisor Dave Faling in Prill's presence.[30] Therefore,

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[28](...continued)
in which the Board found a violation of section 8(a)(1) on facts nearly identical to those in Meyers.

[29]ALJ Decision at 9-10, J.A. 288-89.

[30]Id. at 10, J.A. 289.

the ALJ ruled that Prill's discharge violated section 8(a)(1).

The Board disagreed and dismissed the complaint. Overruling Alleluia and its progeny, the Board argued that activity could be "concerted" only if it in fact involved "some kind of group action," and criticized Alleluia as inconsistent with the statute because it allowed group support to be presumed rather than proven.[31] Claiming to return to "the standard on which the Board and courts relied before Alleluia,"[32] the Board announced the following test for protected concerted activity:

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by or on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1)

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[31] Meyers at 3, 8-10, 115 L.R.R.M. at 1026, 1027-28.

[32] Id. at 11, 115 L.R.R.M. at 1029.

violation will be found if, in addition, the employer knew of the protected nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.[33]

Applying this standard, the Board held that Prill had acted alone and "solely on his own behalf" when he refused to drive the truck and contacted the Tennessee Public Service Commission.[34] As to whether Prill's complaints prior to the accident were joined by Gove, the Board found that the record was clear that "Prill merely overheard Gove's complaint while in the office on another matter."[35] Stating that "the most that can be inferred from this scenario is that another employee was individually con-

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[33] Id. at 12, 115 L.R.R.M. at 1029 (footnotes omitted).

[34] Id. at 16, 115 L.R.R.M. at 1030.

[35] Id.

cerned ...-about the truck's condition," the Board ruled that "[t]aken by itself, ... individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action."[36] Although the Board admitted to being "[o]utraged ... by a respondent who--at the expense of its driver and others traveling on the nation's highways--was clearly attempting to squeeze the last drop of life out of a trailer that had just as clearly given up the ghost," it nevertheless concluded that it did not believe "that section 7, framed as it was to legitimize and protect group action engaged in by employees for their mutual aid and protection, was intended to encompass the case of individual activity

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[36] Id. at 17, 115 L.R.R.M. at 1030 (emphasis in original).

presented here."[37] Therefore, the Board held that Prill's discharge did not violate his rights under section 7.[38]

III. ANALYSIS

A. Standard of Review

Because the Board is entrusted with the "responsibility to adapt the Act to changing patterns of industrial life,"[39] a

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[37] Id. at 18, 115 L.R.R.M. at 1031. The Board added, paraphrasing Chairman Miller's dissent in G.V.R., Inc., 201 N.L.R.B. 147, 148 (1973), that it was "neither God nor the Department of Transportation," and that it was "not empowered to correct all immorality or even illegality arising under the total fabric of Federal and state laws." Meyers at 18, 115 L.R.R.M. at 1031.

[38] One member of the Board dissented, arguing that the Board's "use [of] the concept of concerted activity to cut off protection for the individual employee who asserts collective rights" violated "the history and spirit of Federal labor laws." Id. at 20, 115 L.R.R.M. at 1031 (Member Zimmerman, dissenting).

[39] NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266, 95 S.Ct. 959, 968, 43 L.Ed.2d 171 (1975).

reasonable construction of the Act by the Board is entitled to considerable deference.[40] An agency decision cannot be sustained, however, where it is based not on the agency's own judgment but on an erroneous view of the law. For it is a fundamental principle of law that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."[41] As the Supreme Court stated in its landmark decision in SEC v. Chenery Corp.:

> [I]f [agency] action is based upon a determination of law as to which the reviewing authority of the courts does come into

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[40] See, e.g., NLRB v. City Disposal Sys., Inc., --- U.S. ----, 104 S.Ct. 1505, 1510, 79 L.Ed.2d 839 (1984); Ford Motor Co. v. NLRB, 441 U.S. 488, 495, 99 S.Ct. 1842, 1848, 60 L.Ed.2d 420 (1979).

[41] SEC v. Chenery Corp., 318 U.S. 80, 95, 63 S.Ct. 454, 462, 87 L.Ed. 626 (1943) ("Chenery "); see also SEC v. Chenery Corp., 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947).

> play, an order may not stand if the agency has misconceived the law.... [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.[42]

These principles were concisely stated by Judge Bork in his separate opinion in Planned Parenthood Federation of America, Inc. v. Heckler:[43]

Under SEC v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943), we must judge the validity of an administrative regulation solely on "the grounds upon which the [agency] itself based its action." Id. at 88, 63 S.Ct. at 459. In particular, an agency regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it "was not based on the [agency's] own judgment but rather on the unjustified assumption

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[42]318 U.S. at 94, 63 S.Ct. at 462.

[43]712 F.2d 650 (D.C.Cir. 1983).

that it was Congress' judgment that such [a regulation is] desirable." FCC v. RCA Communications, Inc., 346 U.S. 86, 96, 73 S.Ct. 998, 1005, 97 L.Ed. 1470 (1953). If a regulation is based on an incorrect view of applicable law, the regulation cannot stand as promulgated, unless the "mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached." Massachusetts Trustees v. United States, 377 U.S. 235, 248, 84 S.Ct. 1236, 1245, 12 L.Ed.2d 268 (1964).[44]

We think that the teachings of Chenery are plainly implicated in this case. The Board's opinion clearly reveals

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[44] Id. at 666 (Bork, J., concurring in part and dissenting in part); see also FCC v. RCA Communications, Inc., 346 U.S. 86, 73 S.Ct. 998, 97 L.Ed. 1470 (1953); White v. United States Dep't of the Army, 720 F.2d 209, 210-11 (D.C.Cir. 1983); The Diplomat Lakewood Inc. v. Harris, 613 F.2d 1009, 1018-19 (D.C.Cir. 1979). See generally Friendly, Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 Duke L.J. 199.

that it considered its adoption of a narrow test for "concerted activities" both to be mandated by the NLRA itself and to be merely a return to "the standard on which the Board and courts relied before Alleluia."[45] We believe that the Board misinterpreted the law in two respects. First, we think, especially on the basis of recent Supreme Court decisions, that the Board erred in assuming that the NLRA mandates its present interpretation of "concerted activities." In other words, the Board's opinion is wrong insofar as it holds that the agency is without discretion to construe "concerted activities" except as indicated in the Meyers test.[46] Second, contrary to the view expressed by the Board, we find that the Meyers test

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[45] Meyers at 11, 115 L.R.R.M. at 1029.

[46] We express no view on whether, under §7, the Board may adopt the Meyers test as an exercise of discretion.

does not represent a return to the standard relied on by the courts and by the Board before Alleluia, but instead constitutes a new and more restrictive standard. We therefore conclude that, because the Board's decision stands on a faulty legal premise and without adequate rationale, we must remand the case for reconsideration.

B. The Meyers Test

[3] The Board announced in this case that, "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[47] As counsel for the Board confirmed at oral argument, this test in effect requires that two or more employees join in or authorize conduct before activity can be "concerted" under section

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[47] Meyers at 12, 115 L.R.R.M. at 1029.

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The Board's decisions since Meyers indicate that the new definition will be strictly construed to include only activity clearly joined in or endorsed by other employees. Thus, to find that a complaint by an individual employee was made "on behalf of" others, the Board in effect will require that the complaint have been specifically authorized by other employees.[48] Further, a single employee

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[48]See, e.g., Mannington Mills, Inc., 272 N.L.R.B. No. 15, 117 L.R.R.M. 1233 (Sept. 21, 1984); see also Allied Erecting & Dismantling Co., 270 N.L.R.B. No. 48, 116 L.R.R.M. 1076 (April 30, 1984). In Mannington Mills, the employee, William Frie, was a crew leader in the respondent's shipping department, as well as the elected representative of that department's employees to the company's safety committee, a joint management-employee forum for both safety and nonsafety complaints. Shipping department employees had a "long-standing complaint" about the employer's practice of requiring the night-shift crews to perform loading operations left unfinished by the previous shift. In July 1980, Frie, "acting in his capacity as employee representative," raised this complaint with the safety

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who files a complaint with a state agency will not be held to have engaged in concerted activities, regardless of how clearly his concern is shared by other employees.[49]

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[48](...continued) committee and was told to take it up with the night-shift foreman. In October, he discussed the matter with the foreman and stated that the night-shift employees would refuse to perform such assignments in the future. Upholding Frie's discharge, the Board stated that, even accepting Frie's testimony that a number of other employees had indicated to him that they would refuse to perform the work, nothing in the record showed that they had authorized him to make such a threat to the employer. Thus, the Board concluded that, under Meyers, Frie's threat constituted individual rather than concerted activity.

[49]In Jefferson Elec. Co., 271 N.L.R.B. No. 177, 117 L.R.R.M. 1092 (Aug. 21, 1984), a group of workers was exposed to noxious fumes from a production process as a result of a clogged air vent. Some employees complained to management about the fumes, but without success. The next day 11 employees were sent to the employer's doctor; three were hospitalized for periods of up to two weeks. While in the hospital, the employee most severely ill from the fumes filed a complaint about the incident with the state OSHA. She was (continued...)

The Board's opinion reveals that it believed its present construction of "concerted activities" both to be required by the NLRA and to be a return to standards used by the courts as well as by the Board itself before Alleluia. Although it conceded that "the legislative history of Section 7 does not specifically define 'concerted activity,'" the Board maintained that "it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal."[50] The Board argued that a similar interpretation emerged from an analysis of

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[49](...continued)
later discharged for this action and for her pro-union activity. Because it found no evidence that the employee had solicited the support of others before filing her complaint, the Board held her activity unconcerted under Meyers and therefore upheld her discharge to the extent that it was motivated by her OSHA-related activity.

[50]Meyers at 3, 115 L.R.R.M. at 1025-26.

the language of section 7.[51] The Board then reviewed its pre-Alleluia decisions to show that, "[c]onsistent with this interpretation," they had required "some sort of group action" to be present in order to find conduct to be concerted under section 7.[52] The opinion criticized Alleluia for deviating from this norm, and observed that the Board's post-Alleluia decisions had been rejected by the courts of appeals.[53] The Board concluded:

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[51] According to the Board, "[t]he wording of that section demonstrates that the statute envisions 'concerted' action in terms of collective activity: the formation of or assistance to a group, or action as representative on behalf of a group." Id. at 4, 115 L.R.R.M. at 1026. This interpretation of the statutory language appears to correspond, somewhat roughly, to the standard adopted in Meyers, which holds that action is concerted if it is "engaged in with or on the authority of other employees," id. at 12, 115 L.R.R.M. at 1029.

[52] Id. at 4, 115 L.R.R.M. at 1026.

[53] Id. at 8-10, 115 L.R.R.M. at 1027-28.

> For all the foregoing reasons, we are persuaded that the (Alleluia) per se standard of concerted activity ... is at odds with the Act. The Board and courts always considered, first, whether the activity is [actually] concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both "concerted" and "protected." A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity "concerted" within the meaning of Section 7.
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> * * *
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> Based on the foregoing analysis, we hold that the concept of concerted activity first enunciated in Alleluia does not comport with the principles inherent in Section 7 of the Act. We rely, instead, upon the "objective" standard of concerted activity--the standard on which the Board and courts relied before Alleluia. Accordingly, we hereby overrule Alleluia and its progeny.[54]

As the foregoing passage makes clear, the Board believed that, in rejecting Alleluia and adopting the Meyers test, it was returning to the standards applied by

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[54] Id. at 10-11, 115 L.R.R.M. at 1028-29 (footnote omitted). The Board then proceeded to articulate its new standard for concerted activity. Id. at 11-12, 115 L.R.R.M. at 1029.

the courts and by the Board before Alleluia, and that this approach was "mandated by the statute itself."

Contrary to the dissent's view, it is clear from the Board's opinion that it considered not only its rejection of Alleluia but also its adoption of the Meyers standard to be required by the statute. In the passage quoted above, the Board contrasts the "per se " standard of Alleluia with the approach it claims was traditionally taken by "[t]he Board and courts," which required that conduct be actually concerted for protection under section 7. This approach, the Board maintains, "is mandated by the statute itself." The Board states shortly thereafter that it will rely "upon the 'objective' standard of concerted activity--the standard on which the Board and courts relied before Alleluia;" it then proceeds to articulate the Meyers standard. We

think it could hardly be more clear that the standard the Board adopts is the same approach that it claims was "mandated by the statute itself." Moreover, the Board's adoption of the " 'objective' standard" occurs almost in the same breath as its overruling of Alleluia, and was evidently regarded as based on the same rationale, the Board's view of the requirements of section 7. This reading is confirmed by the Board's opinion as a whole, which is devoted primarily to criticizing Alleluia as inconsistent with the Act and contains not a word of justification for its new standard in terms of the policies of the statute. Thus, even if the dissent were correct that the Board did not regard its adoption of that standard as statutorily compelled, it would still be necessary to remand under Chenery because in that event the Board would have given no rationale whatsoever for the standard it adopted.

Because, in our view, the Board justified its new test as required by section 7 and as a return to traditional standards for concerted activity, we consider these grounds to determine whether they are correct interpretations of law.[55]

C. The Board's Determination That the Meyers Standard is Statutorily Required

Our review of the Supreme Court's decisions interpreting section 7 convinces us that, contrary to the Board's view, the statutory language does not compel it to adopt its present definition of "concerted activities," but rather gives the Board substantial responsibility to determine the scope of that provision in light of its own policy judgment and expertise. The Court has upheld the Board's broad construction of section 7 in a variety of

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[55] See FCC v. RCA Communications, Inc., 346 U.S. 86, 91, 73 S.Ct. 998, 1002, 97 L.Ed. 1470 (1953); Chenery, 318 U.S. at 87, 63 S.Ct. at 459.

contexts,[56] and has emphasized that "the Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life.'"[57]

Last Term, in NLRB v. City Disposal Systems,[58] the Supreme Court specifically rejected the view that the Board was without authority to interpret "concerted activities" broadly to effectuate the purposes of section 7. In City Disposal, as in Meyers, a truck driver was dis-

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[56]See, e.g., Eastex, Inc. v. NLRB, 437 U.S. 556, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978); NLRB v. J. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975); NLRB v. Washington Aluminum Co., 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962).

[57]NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266, 95 S.Ct. 959, 968, 43 L.Ed.2d 171 (1975) (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 236, 83 S.Ct. 1139, 1149, 10 L.Ed.2d 308 (1963)) (citations omitted).

[58]U.S. ----, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984).

charged when he refused to drive a vehicle that he reasonably believed to be unsafe because of faulty brakes. Unlike Prill, however, the employee in City Disposal, James Brown, was covered by a collective bargaining agreement which permitted him to refuse to drive an unsafe vehicle unless the refusal was unjustified. The Board held Brown's conduct protected under the Interboro doctrine. The Sixth Circuit, following the prevailing view in the courts of appeals, denied enforcement on the ground that Interboro was inconsistent with a literal reading of "concerted activities."[59]

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[59] City Disposal Sys., Inc. v. NLRB, 683 F.2d 1005 (6th Cir. 1982) (per curiam); see, e.g., Royal Dev. Co. v. NLRB, 703 F.2d 363, 374 (9th Cir. 1983); Roadway Express, Inc. v. NLRB, 700 F.2d 687, 693-94 (11th Cir. 1983), vacated, U.S. ----, 104 S.Ct. 1699, 80 L.Ed.2d 173 (1984); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 719 (5th Cir. 1973) (dictum); NLRB v. Northern Metal Co., 440 F.2d 881, 884 (3d Cir. 1971); see also Kohls v. NLRB, 629 F.2d 173, 176-77 (continued...)

Reversing the Sixth Circuit, the Supreme Court made clear that section 7 does not compel a narrowly literal interpretation of "concerted activities," but rather is to be construed by the Board in light of its expertise in labor relations. While agreeing with the Meyers Board that the term "concerted activity" "clearly enough embraces the activities of employees who have joined together in order to achieve common goals,"[60] the Court emphasized that "[w]hat is not self-evident from the language of the Act ... is the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the

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[59](...continued)
(D.C.Cir. 1980) (expressing doubts about the validity of Interboro), cert. denied, 450 U.S. 931, 101 S.Ct. 1390, 67 L.Ed.2d 363 (1981).

[60]104 S.Ct. at 1511 (citing Meyers at 3, 115 L.R.R.M. at 1025).

individual is engaged in concerted activity."[61] The Court continued:

> Although one could interpret the phrase, "to engage in concerted activities," to refer to a situation in which two or more employees are working together at 755 F.2d 941 the same time and the same place toward a common goal, the language of §7 does not confine itself to such a narrow meaning. In fact, §7 itself defines both joining and assisting labor organizations--activities in which a single employee can engage--as concerted activities. Indeed, even the courts that have rejected the Interboro doctrine recognize the possibility that an individual employee may be engaged in concerted activity when he acts alone.[62]

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[61] 104 S.Ct. at 1511.

[62] Id. (emphasis added) (footnote omitted). As the Supreme Court noted, the courts that rejected Interboro "limited their recognition of this type of concerted activity, however, to two situations: (1) that in which the lone employee intends to induce group activity, and (2) that in which the employee acts as a representative of at least one other employee." Id. 104 S.Ct. at 1511 (citations omitted). After City Disposal, of course, it is clear that at least a third instance of individual employee action is protected under section 7--the assertion of rights rooted in a collective bargaining agreement.

Because the Court found that the meaning of "concerted activities" was subject to varying interpretations based on "differing views regarding the nature of the relationship that must exist between the action of the individual employee and the actions of the group in order for §7 to apply," it held that the question was for the Board to resolve in light of its expertise in labor relations, as long as its judgment was reasonable.[63] The Court concluded that the Interboro doctrine embodied a reasonable view, agreeing with the Board that "[t]he invocation of a right rooted in a collective bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement," a process that extends from the organization of a union to the enforcement of a collective

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[63]104 S.Ct. at 1510-11.

bargaining agreement achieved through group action.[64]

The Court also found that the Interboro doctrine was not inconsistent with the congressional intent in enacting section 7.[65] Reviewing the history of that provision,[66] the Court concluded that

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[64] Id., 104 S.Ct. at 1511-12.

[65] Id. 104 S.Ct. at 1512.

[66] As the Court explained, the protection for concerted activities originated in ss 6 and 20 of the Clayton Act, ch. 323, 38 Stat. 730, 731, 738 (1915) (currently codified at 15 U.S.C. §17 (1982); 29 U.S.C. §52 (1982)), and §2 of the Norris-LaGuardia Act, ch. 90, 47 Stat. 70, 70 (1933) (currently codified at 29 U.S.C. §102 (1982)). These provisions were enacted to exempt peaceful labor activities from the reach of the federal antitrust laws and the common law doctrine of unlawful conspiracy, which held that labor protests that would have been lawful if made by a single individual were nevertheless unlawful if conducted by a group. In Norris-LaGuardia Act §2, Congress declared that it was the public policy of the United States that "the individual ... worker shall be free from the interference, restraint, or coercion, of employers ... in self-organization or

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in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Id. (emphasis added). The Clayton and Norris-LaGuardia Acts, however, granted legal protection to these rights only against interference by the federal courts through use of the labor injunction. When Congress adopted the National Industrial Relations Act, ch. 90, §7(a), 48 Stat. 195 (1933), and the NLRA, ch. 372, §7, 49 Stat. 449 (1935), it adopted the language of §2 of the Norris-LaGuardia Act to define the rights of employees against employer coercion and discipline as well. See City Disposal, 104 S.Ct. at 1512-13. See generally Gorman & Finkin, supra note 27, at 331-46.

The petitioner, joined by the amici, argues on the basis of this history that NLRA §7 was intended not to protect only conduct engaged in by two or more employees, but rather to extend to group conduct the same protections to which individual actions were entitled. See Brief for Petitioner at 26- 29; Brief of Amici Curiae Workers' Rights Law Project (WRLP) and Philadelphia Area Project on Occupational Safety and Health (PHILAPOSH) at 11-17. This interpretation of the history of §7 has the support of a number of commentators. See, e.g., Gorman & Finkin, supra note 27, at 331- 46; Lynd, The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History, 50 Ind.L.J. 720, 726-34 (1975); Note, Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act, 58 Tex.L.Rev. 991, 1006-08 (1980); see also
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Congress, in enacting section 7, had "sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."[67] Most importantly, the Court observed that "[t]here is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."[68]

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[66](...continued) Illinois Ruan Transp. Corp. v. NLRB, 404 F.2d 274, 289 n. 6 (8th Cir. 1968) (Lay, J., dissenting). We find it unnecessary to consider this argument in the present case, however, since we find that, in any event, the Board was mistaken in its view that the language, history, and prior interpretation of §7 left it without discretion to consider adopting a broader interpretation of the Act.

[67]104 S.Ct. at 1513.

[68]Id.

Thus, City Disposal makes unmistakably clear that, contrary to the Board's view in Meyers, neither the language nor the history of section 7 requires that the term "concerted activities" be interpreted to protect only the most narrowly defined forms of common action by employees, and that the Board has substantial responsibility to determine the scope of protection in order to promote the purposes of the NLRA. The Board's failure in Meyers to recognize the extent of its own interpretative authority has significant consequences. For example, in the past, both the Board and some courts have held that it is necessary under certain circumstances to accord protection to individual conduct in order to protect the development of collective activity.[69]

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[69]See, e.g., Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1347 (3d Cir. 1969) ("To protect concerted activities in full bloom, protection must necessarily be

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Similarly, in City Disposal, the Supreme Court observed that under section 8(a)(1) of the Act "[i]t is possible ... for an employer to commit an unfair labor practice by discharging an employee who is not himself involved in concerted activity but whose actions are related to other employees' concerted activities in such a manner as to render his discharge an interference or restraint on those activities."[70] In Meyers, however, the Board failed even to consider whether the discharge of an employee because of his safety complaints would discourage other employees from engaging in collective

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[69](...continued)
extended to 'intended, contemplated or even referred to' group action, ... lest employer retaliation destroy the bud of employee initiative aimed at bettering terms of employment and working conditions.") (quoting Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964)); cases cited in note 79 infra.

[70]104 S.Ct. at 1512 n. 10.

activity to improve working conditions.

We recognize that the Board did not have the benefit of the Supreme Court's opinion in City Disposal when it decided Meyers, and that this fact may well have contributed to the Board's misconception of the scope of its authority under section 7. Our remand in this case will permit the Board to reconsider Meyers in light of the Supreme Court's intervening decision in City Disposal.

D. Decisions of the Courts and Board Before Alleluia

We also think that the Board was mistaken in its claim that, in adopting the Meyers test, it was simply returning to "the standard on which the Board and courts relied before Alleluia."[71] Because the Board relied on a misreading of precedent in selecting the new standard in Meyers, we remand the decision for

[71] Meyers at 11, 115 L.R.R.M. at 1029.

reconsideration under the principles of Chenery.[72]

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[72]In its brief, Brief for NLRB at 7, 24-27, the Board urges us to uphold its decision partly because it "reasonably acquiesced" in the judicial decisions rejecting the Alleluia doctrine, see note 27 supra. This argument ignores the basic distinction between the Board's rejection of the sweeping Alleluia principle and its establishment of the new standard. The Board's rejection of Alleluia in no way required it to adopt the test enunciated in Meyers.

For other reasons as well, we find the decisions on which the Board relies to be of limited value in deciding the present case. First, many of the cases that rejected Alleluia relied on reasoning or on earlier decisions that disapproved all forms of "constructive concerted activity," including the Interboro doctrine. See, e.g., Jim Causley Pontiac v. NLRB, 620 F.2d 122, 126 n. 7 (6th Cir. 1980) (finding adoption of Alleluia foreclosed by ARO, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979)); NLRB v. Bighorn Beverage, 614 F.2d 1238, 1242 (9th Cir. 1980) (relying on several decisions rejecting or criticizing Interboro); NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1082-84 (8th Cir. 1977) (relying on NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971), and NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 719-20 (5th Cir. 1973)). As the Board concedes, see Brief for NLRB at 26 n. 8, the rationale of such cases does not survive City Disposal.

Furthermore, many of the judicial

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72(...continued)
decisions refusing to hold individual action to be concerted did not involve occupational safety or other statutory rights, but rather involved individual employee protests about job conditions. See, e.g., Ontario Knife Co. v. NLRB, 637 F.2d 840 (2d Cir. 1980); Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980). In such cases, the employee's complaint may appear to the court to be little more than a "personal gripe" unworthy of protection under §7. See Pelton Casteel, 627 F.2d at 29. Few of the cases rejecting Alleluia involved matters of safety, see, e.g., Jim Causley Pontiac, supra; Bighorn Beverage, supra, and we are aware of no such cases in which the conduct for which the employee was disciplined was required by law, as in the present case. In a case quite similar on its facts to Meyers, NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442 (6th Cir. 1981), the Sixth Circuit upheld the Board's finding that a truck driver who was discharged for his safety complaints was engaged in conduct protected by §7. While the court found that there had been considerable group involvement in the safety issue, it also relied on the principles of Alleluia, concluding that the driver was protected because he had "attempt(ed) to enforce federal safety and state inspection regulations ... intended to provide all employees with a safe job environment and the means to protect themselves against job hazards." Id. at 445 (emphasis in original). The Board made no reference to the Lloyd A. Fry decision in its Meyers opinion; moreover, it made no effort to consider whether the case of
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The test adopted by the Board in Meyers derives from the Ninth Circuit's one-sentence per curiam opinion in Pacific Electricord Co. v. NLRB.[73] The Pacific Electricord standard, however, has been followed only in the Ninth Circuit, at least as an exclusive definition of concerted activity. Furthermore, the Pacific Electricord test, which had been

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[72](...continued)
an employee who is discharged for conduct required by laws designed for the benefit of all employees may be distinguishable from the judicial decisions that have rejected the theory of implied concerted activity in other contexts.

[73]361 F.2d 310 (9th Cir. 1966) (per curiam). The Ninth Circuit's statement granting enforcement gives no indication that the test there stated is necessarily intended to be exclusive. Ontario Knife Co. v. NLRB, 637 F.2d 840, 845 (2d Cir. 1980), which the Board cites as authority for its new test in addition to Pacific Electricord, see Meyers at 12 n. 22, 115 L.R.R.M. at 1029 n. 22, articulates no such standard, but rather holds that, to be protected under §7, "the activity must be 'concerted' or, if undertaken by an individual ..., must be looking towards group action." 637 F.2d at 845.

relied upon by the Ninth Circuit in rejecting the Interboro doctrine, was effectively disapproved by the Supreme Court in City Disposal, at least insofar as it applied to individual action in the context of collective bargaining.[74] It is equally noteworthy that no other court has followed Pacific Electricord in defining "concerted activities" under section 7.[75]

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[74] See Royal Dev. Co. v. NLRB, 703 F.2d 363, 372-74 (9th Cir. 1983), disapproved in City Disposal, 104 S.Ct. at 1508 n. 4.

[75] In ARO, Inc. v. NLRB, 596 F.2d 713, 718 (6th Cir. 1979), the Sixth Circuit formulated a standard for concerted activity that resembled--although it was broader than--the Pacific Electricord test adopted by the Board in Meyers:

> For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.

596 F.2d at 718. In reversing the Sixth Circuit in City Disposal, the Supreme

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The Board and most courts have historically taken a broader approach to defining the scope of section 7.[76] In particular, the Meyers test appears to be narrower in at least two important respects than the standards traditionally applied by the Board and the courts to define concerted activity. First, both the Board and the courts have long held that an individual who brings a group complaint to the attention of management is engaged in concerted activity even though he was not designated or authorized to be a

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[75](...continued)
Court implicitly disapproved this standard as well, at least as applied to the assertion of rights under a collective bargaining agreement. See 104 S.Ct. at 1509-10.

[76]Indeed, as early as 1953, a review of the Board's decisions found that the Board had adopted an interpretation of §7 that in effect granted protection even to individual activity that had a tendency to further the common interests of employees. See Note, The Requirement of "Concerted" Action Under the NLRA, 53 Colum.L.Rev. 514, 516-20 (1953).

spokesman by the group.[77] In applying the Meyers test, however, the Board has essentially required that such a complaint have been specifically authorized by the group in order to be protected under section 7.[78]

Second, the courts have long followed the Board's view that individual efforts to enlist other employees in support of common goals is protected by section 7.[79]

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[77] See, e.g., NLRB v. Charles H. McCauley Assocs., Inc., 657 F.2d 685, 688 (5th Cir. Unit B 1981); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1349-50 (3d Cir. 1969), cert. denied, 397 U.S. 935, 90 S.Ct. 943, 25 L.Ed.2d 115 (1970), enforcing 171 N.L.R.B. 1040 (1968); NLRB v. Guernsey-Muskingum Elec. Co-op., Inc., 285 F.2d 8, 12 (6th Cir. 1960), enforcing 124 N.L.R.B. 618 (1959); Carbet Corp., 191 N.L.R.B. 892 (1971).

[78] See note 48 supra.

[79] See, e.g., Root-Carlin, Inc., 92 N.L.R.B. 1313, 1314 (1951); Central Steel Tube Co., 48 N.L.R.B. 604, 612-13, enforced, 139 F.2d 489 (8th Cir. 1943). In Root-Carlin, an employee was discharged (continued...)

79(...continued)
for discussing with various other employees the need to form a union at their plant. Holding the employee's conduct protected, the Board stated, "Manifestly, the guarantees of section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization." 92 N.L.R.B. at 1314.

In Meyers, in order to maintain its view that the NLRB traditionally has required "some kind of group action" to find conduct concerted, the Board treated Root-Carlin as resting on the rationale that the conversations involved "interaction among employees." Meyers at 4-5, 115 L.R.R.M. at 1026. Although the Root-Carlin Board mentioned this point, 92 N.L.R.B. at n. 5, it relied primarily on the policy ground that protecting such activity was essential to the development of employee self-organization. Thus, in explaining the principle the following year, the Board stated, "Group action is not deemed a prerequisite to concerted activity, for the reason that a single person's action may be the preliminary step to acting in concert." Salt River Valley Water Users Ass'n, 99 N.L.R.B. 849, 853 (1952) (footnote omitted), enforced in relevant part, 206 F.2d 325, 328 (9th Cir. 1953). The Board continued to follow this view in later cases. See, e.g., Mason & Hanger-Silas Mason Co., 179 N.L.R.B. 434, 439-40 (1969), enforcement denied on other grounds, 449 F.2d 425 (8th Cir. 1971).

The Board's opinion in Meyers also relied on Continental Mfg. Corp., 155
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The leading case is Mushroom Transportation Co. v. NLRB,[80] which holds that conduct is protected if it is "engaged in with the object of initiating or inducing or preparing for group action or ... had some relation to group action in the

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[79](...continued)
N.L.R.B. 255 (1965), in which the Board found no concerted activity where an employee presented to management a complaint that she claimed was shared by a majority of employees although they were too frightened to speak up themselves. As our discussion has shown, we find that Continental did not represent the dominant trend of the Board's pre-Alleluia decisions. See also Gorman & Finkin, supra note 27, at 297-98 & n. 37 (characterizing Continental as questionable and inconsistent with Board's other decisions). Indeed, less than two months after Continental, the Board, in a decision anticipating Alleluia, held that an employee who, without authorization from other employees, filed a complaint with the Department of Labor seeking an investigation of whether her employer was in violation of the Equal Pay Act was engaged in protected concerted activity under §7. Montgomery Ward & Co., 156 N.L.R.B. 7, 10-11 (1965).

[80]330 F.2d 683 (3d Cir. 1964).

interest of employees."[81] As the Supreme Court indicated in City Disposal, practically all courts follow Mushroom Transportation in holding such conduct protected.[82] It is not clear, however, that the Meyers standard would protect an individual's efforts to induce group action.[83]

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[81] Id. at 685.

[82] 104 S.Ct. at 1511; see, e.g., Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969) ("The activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity. The one seldom exists without the other.").

[83] Several considerations suggest that such conduct is not protected under Meyers. First, granting protection to the lone employee who seeks to induce group action is not easy to fit within the language of Meyers, and the Board's subsequent cases show that the definition generally will be construed strictly. More importantly, the Meyers Board had available to it several decades of judicial and administrative decisions construing §7. Despite its claim to be returning to an

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83(...continued)
interpretation generally accepted before Alleluia, however, it did not adopt the Mushroom Transportation standard, which is accepted, at least as a nonexclusive standard, by most courts of appeals. Nor did it adopt the language of the ARO case, see note 75 supra, which incorporated both the Mushroom Transportation and Pacific Electricord standards. Instead, the Board chose to adopt the language of Pacific Electricord alone. One might assume, therefore, that the Board's choice not to endorse the language of Mushroom Transportation was deliberate.

Several decisions since Meyers contain somewhat conflicting indications on whether the Board will hold efforts to induce group action to be concerted under Meyers. In United Hydraulic Servs., Inc., 271 N.L.R.B. No. 18, 116 L.R.R.M. 1450 (June 29, 1984), the majority declined to decide the question whether an employee's distribution of a complaint to his coworkers constituted concerted activity, holding the employee's discharge unlawful on other grounds. Member Dennis would have held the conduct protected, relying not on the Meyers standard itself but on Meyers' citation to Ontario Knife Co. v. NLRB, 637 F.2d 840, 845 (2d Cir. 1980). See note 73 supra. In two recent cases, divided panels of the Board relied on Mushroom Transportation to hold efforts to promote group action concerted. See Walter Bruckner & Co., 273 N.L.R.B. No. 162, 118 L.R.R.M. 1127 (Dec. 14, 1984); Vought Corp., 273 N.L.R.B. No. 161 (Dec. 14, 1984). In both cases, however, the majority consisted of Member Dennis (who wrote separately in

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The Mushroom Transportation standard has been given varying interpretations by the courts of appeals. Some courts have applied the standard narrowly;[84] others have given it a more expansive interpretation, emphasizing the Third Circuit's statement that conduct is protected if it "had some relation to group action in the

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[83](...continued)
United Hydraulic) and Member Zimmerman (who is no longer with the Board); Chairman Dotson dissented or declined to reach the issue.

[84]See, e.g., NLRB v. Datapoint Corp., 642 F.2d 123 (5th Cir. Unit A 1981); Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980); NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971); Indiana Gear Works v. NLRB, 371 F.2d 273 (7th Cir. 1967). A number of courts relied on Mushroom Transportation to reject the Interboro doctrine. See, e.g., NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 719 (5th Cir. 1973); Northern Metal, supra. These decisions were overruled by City Disposal. Thus, it is clear that while Mushroom Transportation generally establishes a minimum definition of concerted activity applied in the courts of appeals, it is not exhaustive.

interest of employees."[85] Further, a number of cases have expressed the view that an individual employee engages in concerted activity when the purpose of his acts is to promote the welfare of other workers.[86] Finally, in one case, the Sixth Circuit found concerted activity on facts quite close to those in Meyers.[87]

We do not undertake to decide in this

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[85] See, e.g., Randolph Div., Ethan Allen, Inc., 513 F.2d 706, 708 (1st Cir. 1975); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1355 (3d Cir. 1969); Signal Oil & Gas Co. v. NLRB, 390 F.2d 338, 342-43 (9th Cir. 1968).

[86] See, e.g., NLRB v. Charles H. McCauley Assocs., Inc., 657 F.2d 685, 688 (5th Cir. Unit B. 1981); NLRB v. Sencore, Inc., 558 F.2d 433, 434 (8th Cir. 1977); Randolph Div., Ethan Allen, Inc., 513 F.2d 706, 708 (1st Cir. 1975); NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977, 978 (9th Cir. 1973); Illinois Ruan Transp. Corp. v. NLRB, 404 F.2d 274, 288-90 (8th Cir. 1968) (Lay, J., dissenting); see also Keokuk Gas Serv. Co. v. NLRB, 580 F.2d 328, 333-34 (8th Cir. 1978).

[87] NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442 (6th Cir. 1981).

case whether the Board is required to follow any particular approach to concerted activity under section 7. Rather, we review these cases in order to see whether the Board was correct in its view that, in adopting the Meyers test, it was doing no more than conforming to "the standard on which the Board and courts relied before Alleluia." As we have tried to make clear, any fair reading of judicial precedent reveals that the Board's test in Meyers is substantially narrower in important respects than the various standards for concerted activity that have been followed by past Boards and most of the courts of appeals. We therefore conclude that, in adopting the Meyers test, the Board relied on a misinterpretation of judicial decisions and its own prior cases.

Our conclusion highlights the lack of any meaningful support for the Board's

opinion in this case. Not only is the Board's decision grounded on a faulty legal premise (as shown in part III.C. supra), it is also flawed by a lack of rationale. We are therefore constrained, under the authority of Chenery, to remand this case for reconsideration by the Board.

CONCLUSION

We hold that, in adopting the Meyers test of "concerted activities," the Board failed to rely on its own judgment and expertise, and instead based its decision on an erroneous view of the law. The Supreme Court's decision in City Disposal makes clear that the Board is not required to give a narrowly literal interpretation to "concerted activities," but has substantial authority to "defin[e] the scope of §7 '... in the first instance as it considers the wide variety of cases

that come before it.'"[88] Moreover, we find that, contrary to the Board's view, its Meyers standard does not constitute a mere return to the standards traditionally applied by the Board and the courts to define concerted activity, but instead is substantially more restrictive.

This is not a case in which the "mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached."[89] As our discussion has shown, the Board and courts of appeals have taken a variety of approaches to defining "concerted activities," some of which might result in relief for the petitioner. Moreover, the result in a

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[88] City Disposal, 104 S.Ct. at 1510 (quoting Eastex, Inc. v. NLRB, 437 U.S. 556, 568, 98 S.Ct. 2505, 2513, 57 L.Ed.2d 428 (1978)).

[89] Massachusetts Trustees v. United States, 377 U.S. 235, 248, 84 S.Ct. 1236, 1245, 12 L.Ed.2d 268 (1964).

given case will often turn not only on the governing standard but also on the manner in which that standard is applied, and this may well be influenced by whether the Board believes the standard to be dictated by the statute itself or rather adopted as a matter of policy in order to effectuate the purposes of the Act. Thus, we cannot say that the Board's error in this case clearly had no bearing on the result reached.

Rather than remand to the Board, the dissent would have this court determine for itself whether, applying the City Disposal analysis, the conduct at issue here is sufficiently related to the actions of other employees that it should be held protected under section 7. We believe, however, that such a determination is for the Board and not for this court to make in the first instance. The dissent's extensive efforts to provide a

justification for distinguishing between the assertion of rights within and without a collective bargaining context only underscore the failure of the Board to provide a reasoned basis for such a distinction in its own opinion. Our remand in this case is intended to afford the Board a full opportunity to consider such issues in light of the analysis of section 7 in City Disposal.

The dissent unaccountably characterizes our opinion as holding that the Board had discretion under section 7 to adopt the Alleluia doctrine. However, as we have made clear, we do not find it necessary to consider the validity of Alleluia or any other test of concerted activity in this case, and we express no opinion on this issue. The dissent also urges on various grounds that remand is unnecessary because the Board's error in this case is "harmless." We do not believe

that an agency decision can be sustained under any notion of "harmless error" where the agency has failed to exercise its lawful discretion and has provided no rational basis for its determination.

Although we, like the Board, find the facts of this case to be egregious, we stress that this in no way forms the basis of our decision. Nonetheless, we think that the facts of this case highlight the Board's failure to give a considered judgment on the issues involved. In the present case, the Board upheld the discharge of an employee for refusing to drive a vehicle determined to be unsafe by state authorities, despite the fact that both the employee and the company were under a legal obligation not to operate the vehicle.[90] Moreover, the Board's decision in Meyers produces the anomaly that a unionized worker who complains

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[90] See note 18 supra.

about safety or other matters covered by a collective bargaining agreement will be held protected under Interboro and City Disposal, while an unorganized employee will be denied protection for engaging in identical conduct. We agree with the Board that its responsibility is to apply the National Labor Relations Act and not to enforce all state and federal law. This does not mean, however, that with respect to matters within its discretion, the Board should ignore the policy implications of its decisions.

Because we have determined that it was "improper for the [Board] to suppose that the standard it has adopted is to be derived without more from a national policy defined by legislation and by the courts,"[91] we remand the case to the

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[91] FCC v. RCA Communications, Inc., 346 U.S. 86, 94, 73 S.Ct. 998, 1004, 97 L.Ed. 1470 (1953).

Board for reconsideration of the scope of "concerted activities" under section 7.[92]

So ordered.

BORK, Circuit Judge, dissenting:

Petitioner Prill asks this court to set aside an order of the National Labor Relations Board denying him reinstatement and other relief. The Board determined that Prill's employer, Meyers Industries, Inc., did not commit an unfair labor practice by discharging Prill, because the conduct for which Prill was

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[92]In view of our disposition of this case, we have no occasion to consider whether the Board's application of its new standard in this case was supported by substantial evidence.

The petitioner also argues that the Board was required to determine whether §502 of the Labor Management Relations Act, 29 U.S.C. §143 (1982), supports his argument that his conduct is protected under §7. The Board declined to reach this issue on the ground that it was neither raised nor litigated by the General Counsel at the hearing. Meyers at 1 n. 1, 115 L.R.R.M. at 1025 n. 1. We find no basis on which to disturb this ruling by the Board.

not "concerted activit[y]" under section 7 of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §157 (1982). Meyers Industries, Inc., 268 N.L.R.B. No. 73, 115 L.R.R.M. 1025 (Jan. 6, 1984) (hereinafter referred to as "Meyers "). In my view, the Board reached a result that seems to me compelled by section 7. If Prill's actions might be called "concerted," almost any actions might be so characterized and the qualifying word that Congress wrote into the statute would effectively be removed from it. But, in any event, the Board's interpretation of the provision is reasonable and should be upheld without hesitation.

I.

The majority does not purport to disturb any of the Board's findings of fact in this case. It is therefore common ground that Prill was discharged for refusing to drive an unsafe vehicle and

entering safety complaints about the vehicle to his employer and to state authorities. See Meyers at 15, 115 L.R.R.M. at 1030. It is also common ground that "Prill alone refused to drive the truck and trailer; he alone contacted the Tennessee Public Service Commission after the accident; and, prior to the accident, he alone contacted the Ohio authorities. Prill acted solely on his own behalf." Meyers at 16, 115 L.R.R.M. at 1030. Moreover, it is undisputed that as to a similar complaint made in Prill's presence by another driver, one Gove, about the same vehicle, "the judge correctly made no factual finding that Prill and Gove in any way joined forces to protest the truck's condition." Meyers at 16-17, 115 L.R.R.M. at 1030.

In the course of applying section 7 to this case, the Board overruled its decision in Alleluia Cushion Co., 221

N.L.R.B. 999, 1000 (1975), which had held that "where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted." The Board held that "the concept of concerted activity first enunciated in Alleluia does not comport with the principles inherent in Section 7 of the Act," and asserted that it would instead rely "upon the 'objective' standard of concerted activity--the standard on which the Board and the courts relied before Alleluia." Meyers at 11, 115 L.R.R.M. at 1028-29. The Board then proceeded to set forth a definition of concerted activity that "is an attempt at a comprehensive one, [but] we caution that it is by no means exhaus-

tive. We acknowledge the myriad of factual situations that have arisen, and will continue to arise, in this area of the law." Id., 115 L.R.R.M. at 1029. The Meyers reformulation is as follows: "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Id. at 12, 115 L.R.R.M. at 1029 (footnote omitted).

The majority does not dispute that, if the Meyers test is valid, Prill's conduct is not concerted activity and therefore cannot be protected under section 8(a)(1) of the Act, 29 U.S.C. §158(a)(1) (1982). The majority also refrains from holding that Prill's conduct was concerted activity under section 7, and claims to "express no view on whether, under §7, the Board may adopt the Meyers

test as an act of discretion." Maj. op. at 948 n. 46. Nonetheless, invoking SEC v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943), the majority sets aside the Board's order and remands this case to the Board on the grounds that "the Board misinterpreted the law in two respects." Maj. op. at 948. First, the majority argues that the Supreme Court's decision in City Disposal Systems, Inc., U.S. ----, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984), "makes unmistakably clear that, contrary to the Board's view in Meyers, neither the language nor the history of section 7 requires that the term 'concerted activities' be interpreted to protect only the most narrowly defined forms of common action by employees, and that the Board has substantial responsibility to determine the scope of protection in order to promote the purposes of the NLRA." Maj. op. at 952.

Second, the majority states that "contrary to the view expressed by the Board, we find that the Meyers test does not represent a return to the standard relied on by the courts and by the Board before Alleluia, but instead constitutes a new and more restrictive standard." Id. at 948. Because, in the majority's view, the Board in its discretion could have adopted a definition of concerted activity under which petitioner's conduct would be held to be concerted, remand is required. As I shall show, it is the majority rather than the Board that has misinterpreted the law, and in any event the Board's alleged mistakes, if they existed, would be harmless error under the facts of this case.

II.

A.

In this case, the Board has proposed and applied a new test which it regards as

consistent with Congress' intent in employing the words "concerted activities" in section 7 of the NLRA. As the majority recognizes, "the task of defining the scope of §7 is for the Board to perform in the first instance as it considers the wide variety of cases that come before it, and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference." NLRB v. City Disposal Systems, Inc., U.S. ----, 104 S.Ct. 1505, 1510, 79 L.Ed.2d 839 (1984) (citations and quotation marks omitted). The question for decision would appear to be straightforward: is the Board's new construction of section 7 reasonable or not? The anomalous character of the majority's analysis is well shown by the fact that the majority never answers this question.

The Board's reading of section 7 is,

in my view, altogether reasonable, and neither City Disposal nor any other Supreme Court decision suggests otherwise. In City Disposal, the Supreme Court upheld the Board's Interboro doctrine, under which an employee's assertion of a right created by a collective-bargaining agreement is treated as concerted activity. See Interboro Contractors, Inc., 157 N.L.R.B. 1295, 1298 (1966), enforced, 388 F.2d 495 (2d Cir. 1967). The Court noted that the Board in Meyers had distinguished cases involving the Interboro doctrine from the run of section 7 cases because Interboro cases concern conduct that relates back to a collective-bargaining agreement, and concluded that "[t]he Meyers case is thus of no relevance here." 104 S.Ct. at 1510 n. 6.[1] That

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[1]Though the Second Circuit originated the Interboro doctrine, that court found no inconsistency in rejecting the Board's later efforts--of which Alleluia is one

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remark alone suggests, rather strongly one would think, that City Disposal does not control this case and certainly does not support the majority's position.

The Court described the question to which its opinion was addressed as "whether the Board's application of §7 ... is reasonable." 104 S.Ct. at 1510. The Court summarized the dispute over the

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[1](...continued)
example--to find concerted activity in "any case in which a cause advanced by an individual would redound to the benefit of his fellow employees." Ontario Knife Co. v. NLRB, 637 F.2d 840, 845 (2d Cir. 1980). Writing for the court, Judge Friendly urged that "except in the context of agreements between an employer and his employees which are themselves the product of concerted activities, as in Interboro [,] §7 ... should be read according to its terms." Id. Interboro cases were treated specially because "a collective bargaining agreement ... is itself the result of concerted activity." Id. That very rationale, of course, is central to the Supreme Court's reasoning in City Disposal, see 104 S.Ct. at 1511. Hence Ontario Knife tends to confirm the validity of the distinction between the Interboro and Alleluia doctrines drawn by the Board in Meyers, and relied on by the Supreme Court in City Disposal.

Interboro doctrine as one that "merely reflects differing views regarding the nature of the relationship that must exist between the action of the individual employee and the actions of the group in order for §7 to apply." City Disposal, 104 S.Ct. at 1511 (emphasis added). As this language indicates, some real connection between the individual's conduct and group action was presupposed by both contending viewpoints before the Court--and the Court in no way repudiated that threshold requirement. For, as the Court went on to say, the process of which the collective bargaining agreement is a part is "a single, collective activity," which "extend[s] through the enforcement of the agreement." Id. The "relationship" the Court identified between individual assertions of rights derived from a collective-bargaining agreement and group action was, moreover, essentially identi-

cal to the one it perceived between group action and the individual acts of "joining and assisting a labor organization, which §7 explicitly recognizes as concerted," Id. 104 S.Ct. at 1512. In the latter situation, the individual's "actions may be divorced in time, and in location as well, from the actions of fellow employees. Because of the integral relationship among the employees' actions, however, Congress viewed each employee as engaged in concerted activity." Id. (emphasis added). In a footnote the Court added, "[o]f course, at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity." Id. 104 S.Ct. at 1512 n. 10. The Court briefly examined the legislative history of section 7, and, finding the Interboro doctrine "fully

consistent with congressional intent," id. 104 S.Ct. at 1513, concluded that "the doctrine constitutes a reasonable interpretation of the Act." Id. 104 S.Ct. at 1516.

City Disposal establishes only that the Interboro doctrine, which presupposes a real and not imaginary relationship between individual conduct and group action as a condition precedent to finding concerted activity, is a reasonable interpretation of section 7. If the Board in Meyers had held that the Interboro doctrine is inconsistent with the meaning of section 7, I would agree that City Disposal would require us to reject the Board's reasoning. If the Board had held that some other type of individual conduct that was equally directly related to group action could not be deemed concerted activity consistently with section 7, I would agree that City Disposal would

strongly suggest the Board was wrong. But that is not what happened here.

Meyers repudiated the Alleluia doctrine, which deems individual protest grounded in a worker protection statute to be concerted activity whether or not any other employees are involved in the protest. Alleluia's test for concerted activity required less than a "remote" relationship between individual and group activity--it required no relationship at all. City Disposal is therefore completely consistent with the Board's determination that "the concept of concerted activity first enunciated in Alleluia does not comport with the principles inherent in Section 7 of the Act." Meyers at 11, 115 L.R.R.M. at 1028.

Beyond that, I do not think that City Disposal establishes that the Board has discretion to adhere to the Alleluia

doctrine.[2] Nor is there any basis in the language of section 7 for the majority's suggestion that "the case of an employee who is discharged for conduct required by laws designed for the benefit of all employees may be distinguishable from the judicial decisions that have rejected the theory of implied concerted activity in other contexts." Maj. op. at 953 n. 72. City Disposal makes clear that the words

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[2]The majority denies that it is holding that the Board has discretion under section 7 to adopt the Alleluia doctrine. Fair enough. But the majority does not explain how its suggestion, that individual complaints relating to safety statutes are distinguishable from other individual complaints, can be reconciled with the language of section 7 except by reliance on one or both of the rationales the majority identifies as underlying the Alleluia doctrine. Thus, while not directly endorsing "the sweeping Alleluia principle," maj. op. at 953 n. 72, the majority also fails to show that there is a middle ground between Alleluia and the general approach taken by the Board in Meyers which, consistently with the language of section 7, could result in a finding of concerted activity in this case.

"concerted activities" were intended to reach individual conduct that is linked to group activity in any of several ways, but it reaffirms the longstanding rule that there must be both group activity and a clear nexus between that activity and the individual's conduct. The Alleluia doctrine destroyed the statutory requirements of group action and a nexus between that action and the individual's conduct, thereby reading the word "concerted" out of section 7 altogether. The City Disposal Court's careful effort to ground the Interboro doctrine in the language of section 7 confirms the proposition that "s 7 ... should be read according to its terms." Ontario Knife Co. v. NLRB, 637 F.2d 840, 845 (2d Cir. 1980). There is no reading of section 7 "according to its terms" that would allow a finding of concerted action in this case or in

Alleluia-type cases generally.[3] There-

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[3]To be sure, there is one reading of section 7 which purports to be literal and which would ratify the Alleluia doctrine. That reading was suggested in the dissenting opinion in Illinois Ruan Transport Corp. v. NLRB, 404 F.2d 274, 281 (8th Cir. 1968) (Lay, J., dissenting): "The words 'concerted activity' are directly related and defined in terms of their intended purpose of 'collective bargaining' or other 'mutual aid or protection.' The phrases are interrelated and derive substantive meaning from each other." Id. at 288. On this reading, concerted activity may be found to exist "if there is some reasonable relationship connecting an employee's conduct with the 'mutual aid and protection' of other employees and such activity is based upon rights collectively recognized within a bargaining agreement." Id. at 289. In the dissent's view, Illinois Ruan turned on the validity of the Interboro doctrine, see id. at 283, so Judge Lay was not required to take his interpretation further than he did. Clearly, however, once the meaning of "concerted activit(y)" is defined in terms of the words that follow it, activity is concerted either if it is "for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157 (1982) (emphasis added).

This reading is not truly literal, for it makes the word "concerted" in section 7 utterly superfluous: so long as an individual's conduct is for the "mutual aid or protection" of other employees it will always be deemed concerted. And both the Board in Meyers and the Supreme Court

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fore, while I agree with the majority that the Board believed it had no discretion to adhere to the Alleluia doctrine, in my view the Board's belief was entirely correct. Since an individual's appeal to a statute about worker protection involves other workers only in the sense that they "should" be concerned with such protection, it is difficult to see how that case differs from one in which an individual protests about any matter that, in the estimation of the Board or a court, "should" be of concern to other workers. Thus, by sleight of hand, Board or judicial policy replaces congressional policy, individual behavior becomes group action, and the requirement that activity be "concerted" drops from the law.

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[3](...continued)
in City Disposal rejected this reading--the former explicitly, the latter implicitly but no less clearly. See infra p. 961.

Thus, in Meyers the Board found that "under the Alleluia analytical framework, the Board questioned whether the purpose of the activity was one it wished to protect and, if so, it then deemed the activity 'concerted,' without regard to its form. This is the essence of the per se standard of concerted activity." Meyers at 9, 115 L.R.R.M. at 1027. This per se standard presumes that what "ought to be of group concern," id. at 10, 115 L.R.R.M. at 1028, is for the mutual aid or protection of other employees, and therefore that when an individual employee protests over some such matter he is engaging in concerted activity. Id. at 10, 115 L.R.R.M. at 1028. The Board contrasted this approach with the practice of the Board and the courts before Alleluia, which "generally analyzed the concept of protected concerted activity by first considering whether some kind of group

action occurred and, only then, considering whether that action was for the purpose of mutual aid or protection," Meyers at 4-5, 115 L.R.R.M. at 1026, and held that the Alleluia approach was "at odds with the Act." Id. at 10, 115 L.R.R.M. at 1028.

Precisely the same understanding informs City Disposal, where the Court noted at the outset that an employee's assertion of a right derived from a collective-bargaining agreement falls "within the 'mutual aid or protection' standard, regardless of whether the employee has his own interests most immediately in mind." City Disposal, 104 S.Ct. at 1510-11 (citation omitted). Had the Court accepted the reading of section 7 that the Board in Meyers identified as underlying the Alleluia doctrine, it could simply have said that because rights contained in a collective-bargaining

agreement are secured for the mutual aid or protection of all employees who work under that agreement, an individual's assertion of any such right must be deemed to be concerted activity. In fact, however, the Court drew no inference from the finding that the "mutual aid or protection" standard had been met. Instead, the Court based its decision that the Interboro doctrine is a reasonable interpretation of section 7 on the integral relationship between the process of collective bargaining--which is indisputably concerted activity--and the assertion of rights based on a collective bargaining agreement. City Disposal, then, contains no suggestion that it is within the Board's discretion to adhere to the Alleluia doctrine or to any other theory of "constructive" concerted activity that is not grounded in the language of section 7.

B.

The majority also claims, however, that City Disposal establishes that "the Board's opinion is wrong insofar as it holds that the agency is without discretion to construe 'concerted activities' except as indicated in the Meyers test." Maj. op. at 948. This claim is flatly wrong because the Board nowhere held or implied any such thing. The Board did not say that the Act requires the exact formulation it tentatively adopted--it said that the general, pre-Alleluia approach which considers "first, whether the activity is concerted, and only then, whether it is protected," is "mandated by the statute itself." Meyers at 10, 115 L.R.R.M. at 1028. That is simply another way of saying that section 7 does not authorize the Board to find concerted activity merely because one individual's activity concerns matters that affect the

well-being of other employees, and so falls within the "mutual aid or protection" standard. This is the only aspect of its legal analysis that the Board claims is "mandated" by the Act,[4] and, as I have demonstrated in Part II-B supra, the Board's view that section 7 leaves it without discretion on this point is entirely reasonable and fully consistent with City Disposal.[5]

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[4] The Board did deny that "section 7, framed as it was to legitimatize and protect group action engaged in by employees for their mutual aid and protection, was intended to encompass the case of individual activity presented here." Meyers at 18, 115 L.R.R.M. at 1031. At most, that denial is a claim that the result in this case is compelled by the language and purpose of section 7--a claim that indubitably rests on a reasonable interpretation of the statute.

[5] FCC v. RCA Communications, Inc., 346 U.S. 86, 73 S.Ct. 998, 97 L.Ed. 1470 (1953), on which the majority relies in reaching the conclusion that remand is required here, is simply inapposite. RCA Communications holds that when an agency reaches a result in the erroneous belief that the statute compels that result, the

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C.

Even if I agreed with the majority that the Board's opinion held that section 7 required it to adopt a definition of "concerted activit[y]" no broader than the Meyers test, and even if I were convinced that such a holding was erroneous, I would not remand in this case. On the facts as we must take them, there is in my view no definition the Board could propose that would, consistently with the language of section 7, afford petitioner relief. For

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[5](...continued)
court should remand rather than reversing if that result might have been upheld had the agency instead relied on its discretion. Because the Board's discretion in interpreting section 7 is not broad enough to allow the Board to adhere to the Alleluia doctrine, or to hold that Prill's conduct was concerted on any other theory, there is no basis for remanding this case. Remand would be "an idle and useless formality. Chenery does not require that we convert judicial review of agency action into a ping-pong game." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n. 6, 89 S.Ct. 1426, 1430 n. 6, 22 L.Ed.2d 709 (1969).

there is no finding here that petitioner's conduct was in any way related to group activity. In order to find concerted activity here, the Board would have been forced to hold that concert can be presumed where two employees complain about the same piece of equipment on different occasions, merely because the second employee to complain was aware of the first employee's protest. Obviously, the first employee's protest would not be concerted even under this presumption. Hence the Board would be treating the second protest as concerted not because it was related to group activity but merely because it resembled another employee's individual conduct. The language of section 7 does not admit of such a reading. Since the Administrative Procedure Act requires us to review with due regard for "the rule of prejudicial error," 5 U.S.C. §706 (1982), I would deny

the petition and let the alleged infirmities in the Meyers test await challenge on another occasion.

III.

The second flaw the majority finds in Meyers is "a misreading of precedent in selecting the new standard." Maj. op. at 953. The majority's forced reading of the Meyers test wrongly presupposes that the Board intends that test to be exhaustive and resolves every doubt in favor of construing the Meyers test so that it appears as narrow as possible. The Board, it bears emphasizing, explicitly stated that the Meyers test is not meant to be exhaustive, and may be modified as the Board grapples with the "myriad of factual situations" that can be expected to arise under section 7. Meyers at 11, 115 L.R.R.M. at 1029. It is virtually certain that there is at least one category of cases the Board would treat as exceptions

to the Meyers test: cases involving the assertion of rights under a collective-bargaining agreement (for the Board specifically distinguished the Interboro line of cases, see id. at 11, 115 L.R.R.M. at 1028). The Meyers test, as applied to the facts of this case, holds only that, Interboro cases aside, the Board now requires (1) some evidence of intent to actually induce concerted activity, or (2) some evidence of mutual reliance on the conduct or support of other employees, or (3) some evidence of an actual agreement between employees to protest a given situation, as a condition precedent to a finding of concerted action. Nothing more than this can reliably be made out from Meyers, and the majority does not establish that this interpretation of section 7 runs counter to the case law.

The proof of this is that neither of the "two important respects" in which the

majority finds the Meyers test "narrower" than "the standards traditionally applied by the Board and the courts to define concerted activity," maj. op. at 954, can be established on the basis of the record and decision in the present case. The majority's initial claim, that "the new definition will be strictly construed to include only activity clearly joined in or endorsed by other employees," id. at 948, see also id. at 954, rests solely on the majority's reading of the Board's subsequent decisions in Mannington Mills, Inc., 272 N.L.R.B. No. 15, 117 L.R.R.M. 1233 (Sept. 21, 1984), and Allied Erecting & Dismantling Co., 270 N.L.R.B. No. 48, 116 L.R.R.M. 1076 (Apr. 30, 1984). See maj. op. at 948-949 & n. 48.[6] In Meyers

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[6]In addition, the facts of Ontario Knife Co. v. NLRB, 637 F.2d 840 (2d Cir. 1980), which the Board cited as support for the Meyers test, rather clearly resemble those in Mannington Mills and Allied Erecting & Dismantling Co. Ontario

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itself, the only indication given as to the Board's standard in "endorsement" cases is the Board's remark that "there is no evidence here ... that either [Prill or Gove] relied in any measure on the other when each refused to drive the truck." Meyers at 17, 115 L.R.R.M. at 1030. That reveals only that no reliance will not constitute authorization--it does not tell us how much reliance will suffice. Similarly, the principal indication in Meyers as to the scope of the words "with ... other employees" in the Meyers test is the Board's finding that "there is no evidence here that there was any concerted

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[6](...continued)
Knife, which found no concerted activity in an individual employee's refusal to work, despite prior activity (in which the same employee was a participant) that was clearly concerted and related to the same issue involved in the refusal to work, see 637 F.2d at 842-43, suggests that at least this degree of strict construction has some authoritative support in the case law.

plan of action between Gove and Prill." Meyers at 17, 115 L.R.R.M. at 1030.[7] From this we can infer that the Board will not find a "concerted plan of action" where two employees complain about the same piece of equipment on different occasions, even though the second employee was aware of the first employee's protest. The

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[7]What we can, I think, be confident of is that the Board does not mean that if the employer here had offered the keys to Prill's truck to each of his assembled drivers one day, and each had refused to drive it, the Board would find no concerted activity. Under such circumstances, conscious parallelism would be very strong evidence of spontaneous but quite concerted activity. Cf. NLRB v. Washington Aluminum Co., 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962) (holding a spontaneous walk-out protesting working conditions in a non-union plant concerted protected activity). The Board did say that "individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action," Meyers at 17, 115 L.R.R.M. at 1030, and those words could be taken to mean that even this degree of visible cooperation is not concerted activity. But that remark is dictum--and it will also bear a different, narrower, and more sensible meaning. I would give it that meaning.

Board's use of the words "concerted plan of action" suggests that some kind of agreement between the two must be established, but it remains unclear how express that agreement must be, for the record is barren of any evidence even suggesting agreement.

The majority's willingness to go beyond the confines of the record before us to consider how the Meyers test has been applied by the Board in subsequent cases is highly questionable. We are reviewing an order issued by the Board in this case, not a rule or regulation promulgated after notice-and-comment rulemaking, in which we must necessarily consider how the challenged rule will be applied in whatever cases are likely to arise. If the Meyers test, as applied to petitioner Prill, is a reasonable interpretation of the statute, the order should be sustained. The reasonableness of the

Meyers test as applied in subsequent cases can and should be reviewed when the orders in those cases come before a court. Moreover, even if these subsequent decisions could properly be considered here, there is simply no connection between this criticism of the Meyers test and the result reached in this case. The majority concedes that, even if the Board did misinterpret pre-Alleluia case law, remand would be inappropriate if that mistake clearly had no bearing on the substance of the decision reached as to petitioner Prill. See maj. op. at 956. Since there was no evidence that other employees in any way joined in or endorsed petitioner's conduct, that branch of the majority's critique cannot possibly affect the outcome here.

The majority's second objection is that "it is not clear ... that the Meyers standard would protect an individual's

efforts to induce group action." Maj. op. at 955. The majority notes that the Board declined to reach this question in a post-Meyers case, see id. at 955 n. 83, and proceeds to engage in the highly speculative enterprise of deducing, from the Board's choice of citations, that the Board will not hold individual efforts to induce group action to be concerted. Id. The majority gives the impression that the Meyers test, whose wording is borrowed from the Ninth Circuit's language in Pacific Electricord Co. v. NLRB, 361 F.2d 310 (1966) (per curiam), represents a conscious choice on the Board's part to adopt a formulation that no other circuit has followed,[8] while rejecting the

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[8]The Board borrowed the wording of its non-exhaustive Meyers test from that one-sentence opinion, but it also cited as supporting authority Judge Friendly's trenchant opinion for the Second Circuit in Ontario Knife Co. v. NLRB, 637 F.2d 840 (1980). Judge Friendly recognized the "inducement" exception to the general rule

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[8](...continued)
that only concerted activity comes within section 7, which he traced to the fact that "s 7 is not limited to concerted activity per se. Instead, it protects the 'right to engage in ... concerted activities.'" Ontario Knife Co., 637 F.2d at 844-45. Since workers have the right to engage in concerted activity, Judge Friendly agreed that "as the Third Circuit recognized in Mushroom Transportation Co. v. NLRB, 330 F.2d 683 (3 Cir. 1964), employers cannot obstruct an employee's efforts to exercise those rights. Individual activity can be protected, therefore, if it is 'looking toward group action.' Mushroom Transportation, 330 F.2d at 685."

Judge Friendly's statutory argument is a powerful one, and it indicates what is wrong with holding the Board to the standard of exactitude the majority demands of the Meyers test. The Board in Meyers focused, quite understandably, on the words "concerted activities" in section 7, and although it clearly indicated that it would treat at least some "inducement" cases as involving concerted activity, the majority is right in finding some difficulty in bringing such cases within the literal language of the Meyers test. But we are not to suppose that the Board will set that test in concrete, nor should we rush to assume that in a case in which "the right to engage in ... concerted activities" is before it, the Board will not adopt the Mushroom Transportation standard on the statutory grounds given by Judge Friendly in Ontario Knife. Here, that issue was not

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predominant standard, which, according to the majority, is that set out in Mushroom Transportation Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964). The Mushroom Transportation standard differs from the Meyers test principally in that it explicitly states that "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." 330 F.2d at 685.

The majority has overlooked the Board's finding that neither Prill's refusal to drive the truck nor driver

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[8](...continued)
presented, because there was no evidence whatsoever that petitioner's conduct was "looking toward group action."

Gove's earlier refusal, to which Prill was an accidental and silent witness, was "intended to enlist the support of other employees," Meyers at 17, 115 L.R.R.M. at 1031. If the majority were right in thinking that the Meyers test eliminates the "inducement" category of cases from the definition of concerted activity, the Board would have had no need to make this finding.

The majority also slights the Board's discussion of Root-Carlin, Inc., 92 N.L.R.B. 1313 (1951), which the majority cites as one of the leading cases holding that individual attempts to induce concerted activity are themselves concerted. The Board in Meyers relied on Root-Carlin as one of a series of cases it read as "defin[ing] concerted activity in terms of employee interaction in support of a common goal," Meyers at 5, 115 L.R.R.M. at 1026-- cases the Board clearly

approved. The Board plainly indicated that, at a minimum, individual efforts to induce group action that "involve[ ] only a speaker and a listener," id. at 5, 115 L.R.R.M. at 1026 (quoting Root-Carlin, Inc., 92 N.L.R.B. at 1314 (emphasis added by the Board in Meyers)), will be treated as concerted when the speaker, an employee, is addressing the listener, another employee.

Indeed, any fair reading of the Meyers opinion would treat it as incorporating the Mushroom Transportation standard, at least as applied by the court that framed it. It was precisely because the "interaction" among employees present in the conversation in Root-Carlin, Inc. was absent in Mushroom Transportation that the court in the latter case found that the individual employee's conduct was not concerted. It reached that result, despite the fact that the discharged employee "had

been in the habit of talking to other employees and advising them as to their rights," 330 F.2d at 684, because there was no evidence that his "talks with his fellow employees involved any effort on his or their part to initiate or promote any concerted action to do anything about the various matters as to which [he] advised the men or to do anything about any complaints and grievances which they may have discussed with him." Id. at 684-85. A finding of no concerted activity in the present case would seem to follow a fortiori from Mushroom Transportation--for in the present case there was not even a conversation between petitioner and another employee about common grievances, let alone one directed towards concerted activity.[9]

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[9]The majority correctly notes that Prill talked to other drivers about the defective brakes on his truck, see Tr. at 18, J.A. at 42, but there is no indication (continued...)

The "inducement" branch of the majority's critique rests, then, on a misreading of the Meyers opinion. Beyond that, the only way in which this alleged error could possibly affect the outcome in this case would be if the Board could have held that where one employee overhears another employee's complaint (as Prill did Gove's), an effort to induce concerted activity on the second employee's part should be inferred without more. Any such inference would be preposterous, and the majority has not pointed to a single case as so holding, let alone established a clear line of authority to that effect.[10]

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[9](...continued)
that these conversations concerned a common grievance, e.g., a pattern of shoddy maintenance by Meyers Industries that had prompted complaints from other drivers about their trucks, or that Prill sought to enlist the aid of other drivers in any way.

[10]The majority does cite a line of cases including Guernsey-Muskingum Elec.
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[10](...continued)
Coop., Inc., 124 N.L.R.B. 618 (1959), enforced, 285 F.2d 8 (6th Cir. 1960), and Hugh H. Wilson Corp., 171 N.L.R.B. 1040 (1968), enforced, 414 F.2d 1345 (3d Cir. 1969), in which the Board treated individual complaints as protected if they related to a matter of moment to other employees and if the individual was acting for the benefit of the interested group. See maj. op. at 945 & n. 24. But the holdings of those cases are little different (and, if anything, narrower) from one of the rationales the majority identifies as underlying the Alleluia doctrine: "the Board's familiar view that an individual's activity should be protected if it relates to a matter of 'mutual concern' to employees." Maj. op. at 946. That rationale, as I show in Part II-A, reads the word "concerted" out of section 7, and finds no support in City Disposal. And, while that rationale may be "familiar," it has also repeatedly been rejected by the courts of appeals; even when the courts have enforced the Board's orders, they have generally done so because they found actual group activity to which the individual employee's conduct was immediately related. See, e.g., Hugh H. Wilson Corp., 414 F.2d at 1354 (finding concerted activity because "[i]n substance, the employees had a gripe. They assembled. They presented their grievance to management...."); Guernsey-Muskingum Elec. Coop., 285 F.2d at 12 (finding concerted activity because "a reasonable inference can be drawn that the men involved considered that they had a grievance and decided, among themselves,
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Consequently, even if the majority's dubious criticisms of the Board's reading of the case law in Meyers prove well-founded, they are harmless error that cannot support a remand in this case.

IV.

There have been protests in recent years that the "concerted activity" requirement produces such anomalous results that anything resembling a literal reading of section 7 should be abandoned. See, e.g., Gorman & Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U.Pa.L.Rev. 286 (1981); see also Illinois Ruan Transport Corp. v. NLRB, 404 F.2d 274, 281 (8th Cir. 1968) (Lay, J., dissenting). It is a sufficient response that the choice to require that activity

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[10](...continued)
that they would take it up with management").

be concerted before it may be protected "is one decided by Congress when it drafted §7. It is not a choice that can be undone by the courts for policy reasons." E.I. du Pont de Nemours & Co. v. NLRB, 707 F.2d 1076, 1078 n. 2 (9th Cir. 1983). Moreover, as the four dissenting Justices in City Disposal pointed out (without controversion by the majority), "[b]y providing an increased degree of statutory coverage to employees participating in that process, the labor laws encourage and preserve the 'practice and procedure of collective bargaining.' The fact that two employees acting together receive coverage where one acting alone does not is therefore entirely consistent with the labor laws' emphasis on collective action. See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180, 87 S.Ct. 2001, 2006, 18 L.Ed.2d 1123 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650, 653, 85 S.Ct.

614, 616, 13 L.Ed.2d 580 (1965)." City Disposal, 104 S.Ct. at 1518 (O'Connor, J., dissenting) (additional citations omitted). Because what the Board did here was compelled by that congressional choice, I would uphold its order.[11] I therefore

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[11]The majority's suggested limitation of the Alleluia presumption of concerted activity to situations where the employee's conduct is required by laws intended to benefit all employees cannot be linked in any way to the language of section 7, and is therefore completely unpersuasive. The policy considerations that underlie the majority's suggestions should be addressed to the legislature or to the state courts as expositors of the common law. In this connection it is noteworthy that the recent adoption in some states of a "public policy" exception to the employment-at-will doctrine would appear to protect employees who find themselves in a predicament such as petitioner's. See, e.g., Petermann v. International Bhd. of Teamsters, 174 Cal.App.2d 184, 344 P.2d 25 (1959); Palmateer v. International Harvester Co., 85 Ill.2d 124, 52 Ill.Dec. 13, 421 N.E.2d 876 (1981); Sventko v. The Kroger Co., 69 Mich.App. 644, 245 N.W.2d 151 (1976). Indeed, Michigan, where Meyers is located and where Prill was employed, has enacted a statute giving an employee who is discharged for reporting a suspected violation of federal or state law to a public body a cause of action for rein-

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respectfully dissent.

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statement with back pay. Mich.Comp.Laws Ann. §§ 15.361 to .364 (1981). That whistle-blowing statute, however, did not go into effect until after Prill was discharged, and it is also unclear whether the statute's definition of "public body" includes agencies of other states. See Mich.Comp.Laws Ann. §15.361(d). Even before adoption of the whistle-blowing statute, there is some reason to think that Prill would have had a cause of action under state common law. See Trombetta v. Detroit, T. & I.R.R., 81 Mich.App. 489, 265 N.W.2d 385 (1978) (holding that allegations that an employee was discharged for refusing to falsify pollution control reports required by law to be filed with state agency state a claim for which relief can be granted under Michigan law). But it is not for us or the Board to pre-empt these developments.